

(24,596)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 852.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD
COMPANY, PLAINTIFF IN ERROR,

vs.

MATT YURKONIS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

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Writ of Error.**United States of America.**

The President of the United States of America, to
the Judges of the District Court of the United
States, for the Eastern District of New York,
Greeting:

Because, in the record and proceedings, as also
in the rendition of the judgment of a plea which is
in the District Court, before you, or some of you,
between Matt Yurkonis, plaintiff, and The Dela-
ware, Lackawanna and Western Railroad Com-
pany, defendant, a manifest error hath happened,
to the great damage of the said The Delaware,
Lackawanna and Western Railroad Company, as
is said and appears by its complaint, we, being
willing that such error, if any hath been, should
be duly corrected, and full and speedy justice done
to the parties aforesaid in this behalf, do command
you, if judgment be therein given, that then under
your seal, distinctly and openly, you send the rec-
ord and proceedings aforesaid, with all things con-
cerning the same, to the Judges of the United
States Circuit Court of Appeals for the Second
Circuit, at the City of New York, together with
this writ, so that you have the same at the said
place, before the Judges aforesaid, on the 6th day
of July, 1914, that the record and proceedings
aforesaid being inspected, the said Judges of the
United States Circuit Court of Appeals for the
Second Circuit may cause further to be done there-
in, to correct that error, what of right and accord-

Complaint.

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plaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

7

Dated, New York, April 29, 1913.

CHARLES GOLDZIER,

Plaintiff's Attorney,

Office and Post Office Address,

115 Broadway,

Borough of Manhattan,

New York City.

8

Complaint.

SUPREME COURT OF THE STATE OF NEW
YORK,

COUNTY OF RICHMOND.

MATT YURKONIS,

Plaintiff,

against

DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant.

9

Plaintiff complaining of the defendant by Charles Goldzier, his attorney, respectfully shows to the Court and alleges:

I. That the plaintiff is a resident of the City and State of New York, County of Richmond.

II. Upon information and belief that the defendant is and at all the times hereinafter mentioned

10 was a foreign corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania.

III. Upon information and belief that at all the times hereinafter mentioned the defendant did and still does own, operate, manage and control a certain coal mine or colliery known as the "Pettibone" colliery at Luzerne County in the State of Pennsylvania, where at all of said times, it did and still does mine and prepare anthracite coal.

11 IV. That at all of said times hereinafter mentioned and more particularly at the time of the happening of the accident hereinafter described the plaintiff was in the employ of the defendant in its said mines or colliery.

12 V. That on or about the 6th day of July, 1911, while this plaintiff was in the employ of the defendant as aforesaid at its said mine or colliery and was engaged in and about the performance of his duties for and on behalf of the defendant in loading, preparing and setting off a charge of dynamite for the purpose of blasting coal, the explosive gases which had accumulated without the knowledge of the plaintiff at the place where he was working, suddenly ignited and exploded causing the squib attached to the charge of dynamite aforementioned to catch fire and to be immediately consumed so that before the plaintiff could retire or escape to a place of safety, the said charge of dynamite was exploded and discharged and this plaintiff, as a result thereof, and of the explosion and conflagration of said gases, was thrown down, burnt and struck by falling debris and coal and caused to sustain severe, serious and permanent injuries.

VI. That the said accident and the injuries re-

sulting therefrom to the plaintiff were due to the carelessness and negligence of the defendant in that it failed and omitted to provide the plaintiff with a reasonably safe place to work.

18

VII. That the defendant was further careless and negligent in that it failed and omitted to properly ventilate the said place where the plaintiff was at work so as to prevent the accumulation of dangerous, explosive gases therein; but on the contrary, adopted, provided and maintained an improper, defective and dangerous method or means of ventilating the said place and of circulating air through the same for the purpose of dispelling such gases.

14

VIII. That the defendant carelessly and negligently failed and omitted to furnish and maintain in its said mine or colliery proper airshafts, partitions, doors and other structures necessary for the proper ventilation of said place; but on the contrary, allowed, caused or permitted the partitions, doors or other structures provided and maintained by it in its system of ventilation for the purpose of the escape and diversement of air currents from said place to become, be and remain broken, cracked and otherwise insufficient, defective and imperfect and loose and to fall or become displaced so that the air currents intended for passage through and ventilation of said place were diverted and escaped and thereby failed to ventilate said place and dispel and disperse the explosive gases which had accumulated therein.

15

IX. That the defendant carelessly and negligently failed and omitted to adopt, maintain and have carried out a proper system of inspection by means of which said defective, imperfect and unsafe condition of the said doors, partitions and structures and the presence of said explosive gases

- 16 might be discovered; but on the contrary, carelessly and negligently failed and omitted properly and sufficiently to inspect the same or to cause said defects and imperfections to be remedied and repaired.

17 X. That the defendant with knowledge of its said imperfect, defective and dangerous system of ventilation, negligently and carelessly directed and allowed and permitted the plaintiff to have and use an open lamp at or near the place where he was at work by means whereof said explosive gases became and were ignited and exploded; and having such knowledge, carelessly and negligently directed and allowed and permitted the plaintiff to use a squib, easily inflammable and quick-burning, for the purpose of exploding dynamite charges instead of fuses or other slow-burning materials.

XI. That the defendant carelessly and negligently failed and omitted to warn plaintiff of the presence of said explosive gases at said place or to caution him against the danger of gases accumulating therein by reason of said defective, imperfect and dangerous ventilating system.

18 XII. That the manner, method and system adopted by the defendant in the operation of its said mine or colliery and in the performance of the work which the plaintiff was then performing, was dangerous, unsafe and improper.

XIII. That it was the duty of the defendant under the circumstances and in view of said defective, improper and dangerous system of ventilation to adopt, promulgate and enforce proper and sufficient rules and regulations for the performance of work in its said mine or colliery; but that the defendant failed and omitted to make or promulgate

such rules or regulations or to cause the same to be enforced. 19

XIV. Upon information and belief that by an Act and Law of the said State of Pennsylvania, approved the 2nd day of June, 1891, and in full force and effect at the time of the happening of the accident hereinbefore described entitled, "An act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and for the protection and preservation of property connected therewith," it was enacted and provided as follows in Article X:

"Section 1. The owner, operator or superintendent of every mine shall provide and maintain a constant and adequate supply of pure air for the same, as hereinafore provided. 20

"Section 4. The ventilating currents shall be conducted and circulated to and along the face of each and every working place throughout the entire mine, in sufficient quantities to dilute, render harmless and sweep away smoke and noxious or dangerous gases, to such an extent that all working places and travelling roads shall be in a safe and fit state to work and travel therein. 21

"Section 8. All cross-cuts connecting the main inlet and outlet air-passages of every district, when it becomes necessary to close them permanently, shall be substantially closed with brick or other suitable building material, laid in mortar or cement whenever practicable, but in no case shall said air-stoppings be constructed of planks except for temporary purposes.

"Section 9. All doors used in assisting or

22

in any way affecting the ventilation shall be so hung and adjusted that they will close automatically."

And it was further enacted and provided in said Act and Law, in Article XII, Rule 9, as follows:

"In every working approaching any place where there is likely to be an accumulation of explosive gases or in any working in which danger is imminent from explosive gases, no light or fire other than a locked safety lamp shall be allowed or used."

23

XV. That the defendant in violation and disregard of the provisions of said Act and Law aforesaid, negligently and carelessly failed and omitted to provide and maintain a constant and adequate supply of pure air in its said mine at the place where the plaintiff was working; and failed and omitted to cause the ventilating currents to be conducted and circulated to and along the face of said working place in sufficient quantities to dilute, render harmless and sweep away smoke and noxious or dangerous gases to such an extent as to make said working place safe and fit to work; and failed and omitted to when closing the cross-cuts connecting the in-let and out-let air-passages to substantially close them with brick or other suitable building material as required by said Statute, but on the contrary, caused or allowed and permitted said air-stopping to be constructed of broken, cracked and loose plank or wood; and negligently and carelessly directed and allowed the plaintiff to use an open lamp with exposed light or fire in said working place where danger was imminent from explosive gases.

24

XVI. Upon information and belief that by a further Act and Law of said State of Pennsylvania, approved the 10th day of June, 1907, and in full

force and effect at the time of the happening of said accident, entitled, "An Act extending and defining the liability of employers in actions by employees against their employers and defining who are agents of the employer under this act," it was enacted and provided as follows:

"Section 1. Be it enacted, &c., That in all actions brought to recover from an employer for injury suffered by his employe, the negligence of a fellow-servant of the employe shall not be a defense, where the injury was caused or contributed to by any of the following causes, namely:

Any defect in the works, plant, or machinery, of which the employer could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or any other person in charge or control of the works, plant or machinery; the negligence of any person in charge of or directing the particular work in which the employe was engaged at the time of the injury or death; the negligence of any person to whose orders the employe was bound to conform, and did conform, and, by reason of his having conformed thereto, the injury or death resulted; the act of any fellow-servant, done in obedience to the rules, instructions, or orders given by the employer, or any other person who has authority to direct the doing of said act.

Section 2. The manager, superintendent, foreman or other person in charge or control of the works, or any part of the works, shall, under this act, be held as the agent of the employer, in all suits for damages for death or injury suffered by employes.

28

Section 3. All acts or parts of acts inconsistent herewith be and the same are hereby repealed.

XVII. That the conditions hereinbefore described and existing in the defendant's said colliery at the time of the happening of said accident, constituted a defect in the works and plant of the defendant of which the defendant could have had knowledge by the exercise of ordinary care; but that it negligently and carelessly failed and omitted to exercise such ordinary care for the purpose of acquiring such knowledge and remedying such defect.

29

XVIII. That the defendant was further careless and negligent, in that the person or persons in its employ and engaged in its said mine or colliery as superintendent, manager or foreman, and such other person or persons in its employ and having charge or control of its said works and plant, all of whom were in charge of and directing the work in the defendant's said colliery and the particular work in which the plaintiff was engaged at the time of his injury and to whose orders the plaintiff was bound to conform did negligently and carelessly employ to do said work in violation of the acts and laws aforementioned and in an improper, dangerous and unsafe manner, without having first sufficiently and properly or otherwise warned and cautioned him against the dangers to be apprehended therefrom; and in that they did negligently and carelessly fail and omit to comply with the provisions of said acts and laws aforementioned, and that the plaintiff did conform to the orders and directions of said persons and was injured in the manner aforesaid by reason of his having conformed thereto.

30

XIX. That the defendant otherwise wholly failed and omitted to exercise and perform the duties which it owed to the plaintiff in the premises; but that the plaintiff was not guilty of any negligence contributing to said accident. 31

XX. That solely by reason of the carelessness and negligence of the defendant as aforesaid, the plaintiff sustained severe, serious and permanent injuries, including the loss of both eyes and sight, fractures of the skull, lacerations and contusions of the face and body in which were imbedded pieces of coal and coal-dust, causing the discoloration and disfigurement of his face and body; his right hand was maimed and disabled and he sustained a compound fracture of the right leg necessitating the removal of the bones of said leg in small pieces below the knee and above the ankle and the inserting of metal plates in place thereof for the purpose of supporting the leg; his left leg was injured, and he was otherwise severely and permanently maimed, disabled and disfigured in and about his entire body; and he was rendered sick, sore and disabled and so continues and he suffered and will permanently suffer great physical and mental pain and anguish and he was confined to a hospital and to his home and necessarily compelled to undergo medical and surgical treatment in endeavoring to be cured of his said injuries at great cost and expense to him for such treatment and for medicines and medical and surgical appliances; and that ever since the happening of said accident he has been and will permanently be disabled and incapacitated from attending to his usual duties and occupation and prevented thereby from earning the moneys which he would otherwise have earned; and he has been compelled and will permanently be required to hire the services of an attendant to guide and assist 32 33

34 him in getting about and has been and will necessarily be compelled to pay therefor; and has been permanently disabled from engaging in any occupation or earning a livelihood, all to his damage in the sum of seventy-five thousand (\$75,000) dollars.

Wherefore, plaintiff demands judgment against the defendant for the sum of seventy-five thousand (\$75,000) dollars, besides the costs and disbursements of this action.

CHARLES GOLDZIER,

Attorney for Plaintiff,

No. 115 Broadway,

Borough of Manhattan,

New York City.

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City of New York, }
County of New York, } ss.:

Matt Yurkonis, being duly sworn, deposes and says: That he is the plaintiff in the within entitled action, that he has heard read the foregoing complaint, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

36

his

MATT X YURKONIS

mark

Sworn to before me this 19th }
day of April, 1913. }

Louis Julian,

Notary Public,

New York County, No. 31.

Notice of Motion.

37

**SUPREME COURT OF THE STATE OF NEW
YORK,****RICHMOND COUNTY.****MATT YURKONIS,**
Plaintiff,*against***DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,**
Defendant.

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To the above named plaintiff and Charles Gold-
zier, his attorney:

You will please take notice, that on May 23rd,
1913, at 10:00 o'clock in the forenoon, or as soon
thereafter as counsel can be heard, a petition and
bond, of which the attached are copies, will be
presented to the Supreme Court for its approval
at a Special Term, Part I, thereof, in the Di-
vision therein *ex parte* matters will be heard, in
the County Court House, Borough of Brooklyn,
City of New York, New York, which said Term
has been duly appointed to be held then and there
in and for the Second Judicial District of the
State of New York, in which district is Rich-
mond County, wherein the venue of this action
lies.

39

Dated, New York City, May 21st, 1913.

Yours, etc.,

**THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY.**

F. W. THOMPSON & W. S. JENNEY,

Its Attorneys at Law,

No. 90 West Street,

Borough of Manhattan,

New York City.

Petition on Removal.

SUPREME COURT OF THE STATE OF NEW
YORK,

RICHMOND COUNTY.

MATT YURKONIS,
Plaintiff,

against

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant.

To the Supreme Court of the State of New York:

The petition of The Delaware, Lackawanna and Western Railroad Company, respectfully shows:

First. That the above entitled action has been brought in the Supreme Court of the State of New York, in and for the County of Richmond, and that said action is now pending therein.

Second. That said action is brought by the plaintiff to recover from the defendant the sum of seventy-five thousand dollars (\$75,000) damages alleged to have been sustained by reason of an alleged personal injury received by the plaintiff through the negligence of the defendant's servants and representatives, as more fully appears from the complaint herein, a copy of which, as well as a copy of the summons herein, is hereto attached and marked "A" and made a part of this petition.

Third. That the matter in dispute in said action exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000), as ap-

appears in said complaint, a copy of which is hereto attached and made a part hereof as aforesaid.

43

Fourth. That Matt Yurkonis is the sole party plaintiff in this action, and resided at the time of the commencement of this action, and still resides in the County of Richmond and State of New York, and was at the time of the commencement of this action, and still is, an alien and a citizen of a foreign country to which he owes allegiance, and that controversy exists between the plaintiff, Matt Yurkonis and The Delaware, Lackawanna and Western Railroad Company, the petitioner and the defendant in this action.

44

Fifth. That your petitioner is the sole party defendant to said action, and that said action is one in which there can be a final determination of the controversy between the petitioner and the plaintiff without the presence or intervention of any other person or defendant as party thereto.

Sixth. That your petitioner was at the time of the commencement of this action, and still is, a foreign corporation, organized and existing under the Laws of the State of Pennsylvania, and the controversy in said action exists solely between your petitioner, a non-resident corporation, and an alien.

45

Seventh. That said action was commenced by the service of a summons and complaint on the petitioner, on the seventh day of May, 1913; that your petitioner has neither answered or otherwise pleaded to the complaint herein, and its time to do so under the laws of the State of New York and the rules of the said Supreme Court, does not expire until the twenty-seventh day of May, 1913, and that no term of this Court at which said ac-

46 tion could have been tried has been held, and that there has been no trial thereof.

47 Eighth. And your petitioner offers herewith a bond with good and sufficient surety, for its entering into the District Court of the United States for the Eastern District of New York, within thirty (30) days from the date of filing this petition, a certified copy of the record in this suit and of all process, pleadings, testimony, depositions and other proceedings herein; and also for paying all costs which may be awarded by the said District Court, if said District Court shall hold that this action was wrongfully or improperly removed thereto.

48 And your petitioner therefore prays this Court, that this suit may be removed for trial into the next District Court of the United States held in the District where the same is pending, to wit, the Eastern District of New York, pursuant to the statutes of the United States in such case made and provided, and that this Court do accept and approve this petition and said bond, and the security offered by your petitioner aforesaid, and do proceed no further herein, except to cause the record herein to be removed into said District Court.

And your petitioner will ever pray, etc.

Dated, New York, May 21st, 1913.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,

By A. D. Chambers,
Secretary and Treasurer.

F. W. THOMSON & W. S. JENNEY,
Attorneys for Petitioner,
90 West Street,
New York City.

State of New York,
County of New York, } ss.:
City of New York,

49

A. D. Chambers, being duly sworn, deposes and says: That he is the Secretary and Treasurer of the above named petitioner, The Delaware, Lackawanna and Western Railroad Company; that he has read the foregoing petition and that it is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

That the reason why this petition is not verified by the petitioner, is that it is a foreign corporation, and that deponent is an officer thereof as aforesaid; that the sources of deponent's knowledge and the grounds of his belief as to all the matters therein not stated to be on knowledge, are statements and reports received from officers and agents of defendant, having in charge the matters referred to in said petition.

50

A. D. CHAMBERS.

Subscribed and sworn to before me }
this 21st day of May, 1913. }

Joseph Fiell,
[SEAL.] Notary Public, No. 1077,
New York County.

51

The following papers were attached to the petition: Copy of summons and complaint and bond for \$500.00 of the Title Guaranty & Surety Company.

DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

MATT YURKONIS,
Plaintiff,

against

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant.

The defendant, The Delaware, Lackawanna and Western Railroad Company, answers the complaint of the plaintiff herein, as follows, namely:

For a first defense to the plaintiff's alleged cause of action herein:

First. The defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph or subdivision marked "I" of said complaint.

Second. It admits the allegations contained in subdivisions or paragraphs marked "II," "III" and "IV" of said complaint.

Third. The defendant admits that the quotations of the statutes of the laws of the State of Pennsylvania contained in subdivisions or paragraphs marked "XIV" and "XVI" in said complaint are correct, but alleges that only part of the said laws are set forth in said subdivisions.

Fourth. Upon information and belief the defendant denies the allegations contained in subdivi-

sions or paragraphs marked "V," "VI," "VII," "VIII," "IX," "X," "XI," "XII," "XIII," "XV," "XVII," "XVIII," "XIX" and "XX" of the said complaint.

55

For a second and further and complete defense to the plaintiff's alleged cause of action herein:

Fifth. The defendant alleges and shows to the Court that the injuries which plaintiff received while in the employ of the defendant, as mentioned in said complaint, were caused solely and wholly on account of plaintiff's own carelessness and negligence.

For a third and separate and distinct defense to the cause of action alleged in the complaint herein:

56

Sixth. Defendant alleges, upon information and belief, that the said accident occurred and the said injuries to the plaintiff were sustained by reason of his own negligence, and that if any negligence other than that of the plaintiff caused or contributed to cause the said accident and injuries, it was the negligence of the competent fellow servant or competent fellow servants of the plaintiff, for whose acts this defendant is not liable.

For a fourth and separate and distinct defense to the plaintiff's alleged cause of action herein:

57

Seventh. The defendant alleges, upon information and belief, that the accident to the plaintiff and the injuries to him were sustained while he was in the employ of the defendant as a coal miner; that said employment at the time plaintiff entered upon it was an obviously dangerous one, and it continued to be so during all of the term of said employment, and the risks incident thereto were at all times obvious and well known to the plaintiff, and were assumed by him during the entire term

58 of his employment; that the accident and injuries complained of arose from and were risks incident to said employment which plaintiff took and assumed at the time he entered upon said employment and continued to take and assume said risks at all times during the continuance of said employment.

For a fifth and separate defense to the cause of action set forth in said complaint:

59 Eighth: The defendant alleges, upon information and belief, that the plaintiff was in the employ of the defendant as a coal miner and said employment was entered into by the plaintiff, and the relations of the plaintiff and defendant during the continuance of said employment were controlled by the laws of the State of Pennsylvania; that said laws are statutes of the said State enacted at various times by the Legislature of the State of Pennsylvania, and are commonly known as the Anthracite Mining Laws, and that by virtue of the provisions of said statutes, the defendant is not liable on account of the injuries to the plaintiff as set forth in said complaint. That plaintiff's injuries, if caused or contributed to by the negligence of any other person than himself, were caused or contributed to by mine-foremen and other employes of the defendant, for whose negligence defendant is not liable by virtue of the provisions of the said statutes.

60

Wherefore, defendant demands that the complaint herein be dismissed, with costs.

F. W. THOMSON,

W. S. JENNEY,

Attorneys for Defendant,

Office and Post Office Address,

No. 90 West Street,

Borough of Manhattan,

New York City.

State of New York,
County of New York, } ss.:
City of New York,

61

A. D. Chambers, being duly sworn, deposes and says: That he is the Secretary and Treasurer of the above named defendant, The Delaware, Lackawanna and Western Railroad Company; that he has read the foregoing answer and tha it is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

That the reason why this answer is not verified by the defendant, is that it is a foreign corporation, and that deponent is an officer thereof as aforesaid; that the sources of deponent's knowledge and the grounds of his belief as to all the matters therein not stated to be on knowledge, are statements and reports received from officers and agents of defendant, having in charge the matters referred to in said answer.

62

A. D. CHAMBERS.

Subscribed and sworn to before me }
this 27th day of May, 1913. }

Joseph Fiell,
Notary Public,
New York County.

63

64

Order of Substitution.

At a Term of the District Court of the United States, Eastern District of New York, held at Court House in the Borough of Brooklyn, City of New York, on the seventeenth day of September, A. D. 1913.

Present—Hon. VAN VECHTEN VEEDER, District Judge.

65

MATT YURKONIS,
Plaintiff,

against

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant.

On reading and filing the annexed consent of the plaintiff, and of Charles Goldzier, his attorney, and on motion of Baltrus S. Yankaus, attorney, it is

66

Ordered, that Baltrus S. Yankaus, attorney and counselor at law of New York City, be and hereby is substituted in place of Charles Goldzier, as attorney for the plaintiff in the above entitled action.

VAN VECHTEN VEEDER,
U. S. D. J.

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF NEW YORK.

MATT YURKONIS,
Plaintiff,

against

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant.

We hereby consent that Baltrus S. Yankaus, attorney and counselor at law, of New York City, be substituted in the place and stead of the undersigned Charles Goldzier, as attorney for the plaintiff in the above entitled action, and that an order to that effect may be entered without further notice.

Dated, New York, June 18, 1913.

his

MATT X YURKONIS,
mark

Plaintiff.

CHARLES GOLDZIER,

Attorney for Plaintiff.

BALTRUS S. YANKAUS,

Attorney and Counselor at Law.

State of New York, }
City of New York, } ss.:
County of New York, }

On this eighteenth day of June, in the year 1913, before me personally came the above named Matt Yurkonis, to me known, and known to me to be the same person described in and who executed

70 the foregoing consent and he thereupon acknowledged to me that he executed the same.

LOUIS APPLEBAUM,
Notary Public, No. 38,
New York County.

Amended Complaint.

DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF NEW YORK.

71

MATT YURKONIS,
Plaintiff,

against

DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant.

Plaintiff complaining of the defendant by Baltus S. Yankaus, his attorney, by this, his amended complaint, respectfully shows to the Court and alleges:

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I. That the plaintiff is a resident of the City of New York, State of New York and County of Richmond.

II. Upon information and belief, that the defendant is and at all the times hereinafter mentioned was, a foreign corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania.

III. Upon information and belief, that the defendant is and at all the times hereinafter mentioned, was, a common carrier, engaged in inter-

state commerce by railroad; and owning, operating, managing and controlling a railroad in the State of Pennsylvania and between said State and divers other States of the United States.

73

IV. Upon information and belief, that at all the times hereinafter mentioned, the defendant did and still does own, operate, manage and control, for the sole purposes of its said railroad, and as appurtenant thereto and part of its works and equipment in connection therewith, a certain coal mine or colliery, known as the "Pettibone Colliery" at Luzerne County, in the State of Pennsylvania, where at all of said times, it did and still does mine and prepare anthracite coal for use in its locomotives and engines and other equipments used in its said business as a common carrier engaged in interstate commerce by railroad.

74

V. That at all the times hereinafter mentioned, and more particularly at the time of the happening of the accident hereinafter described, the plaintiff was employed by the defendant at its said mine or colliery, in such interstate commerce as aforesaid.

VI. That on or about the sixth day of July, 1911, while this plaintiff was in the employ of the defendant as aforesaid, at its said mine or colliery, and was engaged in and about the performance of his duties for and on behalf of the defendant in loading, preparing and setting off a charge of dynamite for the purpose of blasting coal, the explosive gases which had accumulated without the knowledge of the plaintiff at the place where he was working, suddenly ignited and exploded, causing the squib attached to the charge of dynamite aforementioned to catch fire and to be

75

76 immediately consumed so that before the plaintiff could retire or escape to a place of safety, the said charge of dynamite was exploded and discharged, and this plaintiff, as a result thereof, and of the explosion and conflagration of said gases, was thrown down, burned and struck by falling debris and coal and caused to sustain severe, serious and permanent injuries.

77 VII. That the said accident and the injuries resulting therefrom to the plaintiff were due solely to the carelessness and negligence of the defendant, its vice-principals, superintendents, officers, agents or employees, in that they failed and omitted to provide the plaintiff with a reasonably safe place to work.

VIII. That the defendant, its vice-principals, superintendents, officers, agents or employees were further careless and negligent in that they failed and omitted to properly ventilate the said place where the plaintiff was at work, so as to prevent the accumulation of dangerous, explosive gases therein; but on the contrary, adopted, provided and maintained an improper, defective and dangerous method or means of ventilating the said place and of circulating air through the same for
78 the purpose of dispelling such gases.

IX. That the defendant, its vice-principals, superintendents, officers, agents or employees, carelessly and negligently failed and omitted to furnish and maintain in its said mine or colliery proper air-shafts, partitions, doors and other structures necessary for the proper ventilation of said place; but on the contrary, allowed, caused or permitted the partitions, doors or other structures provided and maintained by it in its system of ventilation for the purpose of the escape

and diversement of air currents from said place to become, be and remain broken, cracked and otherwise insufficient, defective and imperfect and loose and to fall or become displaced so that the air-currents intended for passage through and ventilation of said place were diverted and escaped and thereby failed to ventilate said place and disperse and disperse the explosive gases which had accumulated therein.

79

X. That the defendant, its vice-principals, superintendents, officers, agents and employees carelessly and negligently failed and omitted to adopt, maintain and have carried out a proper system of inspection by means of which said defective, imperfect and unsafe conditions of the said doors, partitions and structures and the presence of said explosive gases might be discovered; but, on the contrary, carelessly and negligently failed and omitted properly and sufficiently to inspect the same or to cause said defects and imperfections to be remedied and repaired.

80

XI. That the defendant was further negligent in that its vice-principals, superintendents, agents, officers or employees, with knowledge of its said imperfect, defective and dangerous system of ventilation, negligently and carelessly supplied, directed, allowed and permitted the plaintiff to have and use an open lamp at or near the place where he was at work by means whereof said explosive gases became and were ignited and exploded; and having such knowledge, carelessly and negligently directed and allowed and permitted the plaintiff to use a squib, easily inflammable and quick-burning, for the purpose of exploding dynamite charges instead of fuses or other slow-burning materials.

81

XII. That the defendant was further negligent

82 in that its vice-principals, superintendents, officers, agents or employees, carelessly and negligently failed and omitted to warn plaintiff of the presence of said explosive gases at said place or to caution him against the danger of gases accumulating therein by reason of said defective, imperfect and dangerous ventilating system.

83 XIII. That the manner, method and system adopted by the defendant, its officers, vice-principals, superintendents, officers, agents or employees, in the operation of its said mine or colliery and in the performance of the work which the plaintiff was then performing, was dangerous, unsafe and improper.

84 XIV. That it was the duty of the defendant, its officers, vice-principals, superintendents, agents or employees, under the circumstances and in view of said defective, improper and dangerous system of ventilation, to adopt, promulgate and enforce proper and sufficient rules and regulations for the performance of work in its said mine or colliery; but that the defendant, its officers, vice-principals, superintendents, agents or employees, failed and omitted to make or promulgate such rules or regulations or to cause the same to be enforced but that the defendant in violation of such duty falsely and negligently adopted and enforced rules and ways and means of performance of services in the said mine, pursuant whereunto this plaintiff was directed and compelled to use dangerous tools, appliances, squibs, caps and dynamite and open lamps, and other improper and dangerous instruments, and negligently and carelessly failed to adopt reasonably safe rules and regulations and ways to charge the dynamite by using fuse, caps and squibs, exploded by electricity and upon reasonable and sufficient notice to the plaintiff, and

in place thereof adopted rules for the explosion of charges of dynamite by means of light, and negligently failed to furnish or supply the plaintiff with electricity, electric wires and other electrical appliances and means and tools and machinery for the exploding of squibs or dynamite at a safe distance, and by reasonably safe means and appliances. 85

XV. That the condition hereinbefore described and existing in the defendant's said mine or colliery at the time of the happening of said accident, and resulting in the plaintiff's injury as aforesaid, constituted a defect or insufficiency in the works or equipment of the defendant due to its negligence. 86

XVI. Upon information and belief, that by an Act and Law of the said State of Pennsylvania, approved the 2nd day of June, 1891, and in full force and effect at the time of the happening of the said accident hereinbefore described, entitled, "An act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and for the protection and preservation of property connected therewith," it was enacted and provided as follows in Article X:

"Section 1. The owner, operator or superintendent of every mine shall provide and maintain a constant and adequate supply of pure air for the same, as hereinbefore provided. 87

"Section 4. The ventilating currents shall be conducted and circulated to and along the face of each and every working place throughout the entire mine, in sufficient quantities to dilute, render harmless and sweep away smoke and noxious or dangerous gases, to such an extent that all working

88 places and traveling roads shall be in a safe and fit state to work and travel therein.

"Section 8. All cross-cuts connecting the main inlet and outlet air-passages of every district, when it becomes necessary to close them permanently, shall be substantially closed with brick or other suitable building material, laid in mortar or cement whenever practicable, but in no case shall said air-stoppings be constructed of planks except for temporary purposes.

89 "Section 9. All doors used in assisting or in any way affecting the ventilation shall be so hung and adjusted that they will close automatically."

And it was further enacted and provided in said Act and Law in Article XII, Rule 1:

"The owner, operator or superintendent of a mine or colliery shall use every precaution to insure the safety of the workmen in all cases, whether provided for in this act or not."

Rule 8:

90 "If at any time it is found by the person for the time being in charge of the mine or any part thereof, that by reason of noxious gases prevailing in such mine, or such part thereof, or of any gas whatever, the mine or the said part is dangerous, every precaution shall be used to insure the safety of the workmen."

Rule 9:

"In every working approaching any place where there is likely to be an accumulation

of explosive gases, or in any working in which danger is imminent from explosive gases, no light or fire or other than a locked safety lamp, shall be employed and used." 91

And it was further provided by Article XVII of such act, Section 8.

"That for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any owner, operator, superintendent, mine foreman or fire boss of any coal mine or colliery, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby." 92

And that the acts and omissions causing the injury of this plaintiff referred to, were caused by acts and omissions on the part of the defendant, its vice-principals or superintendents, in the failure to comply with the laws of the State of Pennsylvania, as aforesaid. That such laws applied to all collieries of the said State employing more than ten persons in and about the mining therein conducted, and that the defendant did employ more than ten persons in and about such mining, and hence came within the provisions of the said law. 93

XVII. That the defendant was further negligent in that its officers, vice-principals, superintendents, agents or employees, in violation and disregard of the provisions of said Act and Law, aforesaid, negligently and carelessly failed and omitted to provide and maintain a constant and adequate supply of pure air in its said mine at the place where the plaintiff was working; and failed and omitted to cause the ventilating currents to be conducted and circulated to and along the face of said

- 94 working place in sufficient quantities to dilute, render harmless and sweep away smoke and noxious or dangerous gases to such an extent as to make said working place safe and fit to work; and failed and omitted, when closing the cross-cuts connecting the inlet and outlet air passages, to substantially close them with brick or other suitable building material as required by said Statute, but on the contrary, caused or allowed and permitted said air-stopping to be constructed of broken, cracked and loose plank or wood; and negligently and carelessly directed and allowed the plaintiff to use an open lamp with exposed light or fire in said work-
- 95 ing place where danger was imminent from explosive gases.

XVIII. Upon information and belief, that by a further Act and Law of said State of Pennsylvania, approved the 10th day of June, 1907, and in full force and effect at the time of the happening of said accident, entitled: "An Act extending and defining the liability of employers in actions by employees against their employers and defining who are agents of the employers under this act," it was enacted and provided as follows:

- 96 "Section 1. Be it enacted, &c., That in all actions brought to recover from an employer for injury suffered by his employe, the negligence of a fellow servant of the employe shall not be a defense, where the injury was caused or contributed to by any of the following causes, namely: Any defect in the works, plant or machinery, of which the employer could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman or any other person in charge or control of the works, plant or machinery;

the negligence of any person in charge of or directing the particular work in which the employe was engaged at the time of the injury or death; and negligence of any person to whose orders the employe was bound to conform, and did conform, and by reason of his having conformed thereto, the injury or death resulted; the act of any fellow servant, done in obedience to the rules, instructions, or orders given by the employer, or any other person who has authority to direct the doing of said act.

97

"Section 2. The manager, superintendent, or foreman or other person in charge or control of the works, or any part of the works, shall under this act be held as the agent of the employer, in all suits for damages for death or injury suffered by employees.

98

"Section 3. All acts or parts of acts inconsistent herewith be and the same are hereby repealed."

XIX. That the conditions hereinbefore described and existing in the defendant's said colliery at the time of the happening of said accident, constituted a defect in the works and plant of the defendant of which the defendant could have had knowledge by the exercise of ordinary care; but that it negligently and carelessly failed and omitted to exercise such ordinary care for the purpose of acquiring such knowledge and remedying such defect.

99

XX. That the defendant was further careless and negligent in that the person or persons in its employ and engaged in its said mine or colliery as vice-principals, superintendent, manager or foreman, and such other person or persons in its em-

100 ploy and having charge or control of its said works
and plant, all of whom were in charge of and di-
recting the work in the defendant's said colliery
and the particular work in which the plaintiff was
engaged at the time of his injury, and to whose or-
ders the plaintiff was bound to conform, did, neg-
ligently and carelessly, employ and direct the plain-
tiff to do said work in violation of the acts and
laws aforementioned, and in an improper, danger-
ous and unsafe manner, without having first suf-
ficiently and properly, or otherwise warned and
cautioned him against the dangers to be appre-
hended therefrom; and in that they did negligently
101 and carelessly fail and omit to comply with the
provisions of said acts and laws aforementioned,
and the plaintiff did conform to the orders and di-
rections of said persons and was injured in man-
ner aforesaid by reason of his having conformed
thereto.

XXI. The defendant was further negligent, in
that its officers, vice-principals, superintendent,
agents, or employes, otherwise wholly failed and
omitted to exercise and perform the duties which
it owed to the plaintiff in the premises; but that
the plaintiff was not guilty of any negligence con-
tributing to said accident.

102

XXII. That solely by reason of the carelessness
and negligence of the defendant, its vice-principals,
superintendents, its agents, officers or employes,
as aforesaid, the plaintiff sustained severe, serious
and permanent injuries, including the loss of both
eyes and sight, fractures of the skull, lacerations
and contusions of the face and body in which were
imbedded pieces of coal and coal-dust, causing the
discoloration and disfigurement of his face and
body; his right hand was maimed and disabled, and
he sustained a compound fracture of the right leg

necessitating the removal of the bones of said leg in small pieces below the knee and above the ankle and the inserting of metal plates in place thereof, for the purpose of supporting the leg; his left leg was injured, and he was otherwise severely and permanently maimed, disabled and disfigured in and about his entire body; and he was rendered sick, sore and disabled, and so continues, and he suffered, and will permanently suffer, great physical and mental pain and anguish, and he was confined to a hospital and to his home and necessarily compelled to undergo medical and surgical treatment in endeavoring to be cured of his said injuries, at great cost and expense to him for such treatment, and for medicines and medical and surgical appliances; and that ever since the happening of said accident he has been and will permanently be disabled and incapacitated from attending to his usual duties and occupation and prevented thereby from earning the moneys which he would otherwise have earned; and he has been compelled and will permanently be required to hire the services of attendants to guide and assist him in getting about, and he has been and will necessarily be compelled to pay therefor; and has been permanently disabled from engaging in any occupation or earning a livelihood, all to his damage in the sum of seventy-five thousand (\$75,000) dollars.

Wherefore, plaintiff demands judgment against the defendant for the sum of seventy-five thousand (\$75,000) dollars, besides the costs and disbursements of this action.

BALTRUS S. YANKAUS,
Attorney for Plaintiff,
Office & P. O. Address,
No. 154 Nassau Street,
Borough of Manhattan,
New York City.

106 State of New York, }
City of New York, } ss.:
County of New York, }

Matt Yurkonis, being duly sworn, deposes and says: That he is the plaintiff in the within-entitled action, that he has heard read the foregoing amended complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

107 his
MATT X YURKONIS.
mark

Sworn to before me this 2nd }
day of October, 1913. }

Elias H. Avram,
Commissioner of Deeds,
City of New York.

Answer to Amended Complaint.

DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

108 }
MATT YURKONIS,
Plaintiff,

against

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant. }

The defendant, The Delaware, Lackawanna and Western Railroad Company, answers the amended

complaint of the plaintiff herein, as follows, 109
namely:

For a first defense to the plaintiff's alleged cause of action herein:

First. The defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph or subdivision marked "I" in said complaint.

Second. It admits the allegations contained in subdivision or paragraph marked "II" in said complaint. 110

Third. The defendant admits that the quotations of the statutes of the laws of the State of Pennsylvania contained in subdivisions or paragraphs marked "XVI" and "XVIII" in said complaint are correct, but alleges that only part of the said laws are set forth in said subdivisions.

Fourth. Upon information and belief the defendant denies the allegations contained in subdivisions or paragraphs marked "III," "IV," "V," "VI," "VII," "VIII," "IX," "X," "XI," "XII," "XIII," "XIV," "XV," "XVII," "XIX," "XX," "XXI" and "XXII" in the said complaint. 111

For a second and further and complete defense to the plaintiff's alleged cause of action herein:

Fifth. The defendant alleges and shows to the Court that the injuries which plaintiff received while in the employ of the defendant, as mentioned in said complaint, were caused solely and wholly on account of plaintiff's own carelessness and negligence.

For a third and separate and distinct defense to the cause of action alleged in the complaint herein:

112 Sixth. Defendant alleges, upon information and belief, that the said accident occurred and the said injuries to the plaintiff were sustained by reason of his own negligence, and that if any negligence other than that of the plaintiff caused or contributed to cause the said accident and injuries, it was the negligence of the competent fellow servant or competent fellow servants of the plaintiff, for whose acts this defendant is not liable.

For a fourth and separate and distinct defense to the plaintiff's alleged cause of action herein:

113 Seventh. The defendant alleges, upon information and belief, that the accident to the plaintiff and the injuries to him were sustained while he was in the employ of the defendant as a coal miner; that said employment at the time plaintiff entered upon it was an obviously dangerous one, and it continued to be so during all of the term of said employment, and the risks incident thereto were at all times obvious and well known to the plaintiff, and were assumed by him during the entire term of his employment; that the accident and injuries complained of arose from and were risks incident to said employment which plaintiff took and assumed at the time he entered upon said employment and continued to take and assume said risks at all times during the continuance of said employment.

114 For a fifth and separate defense to the cause of action set forth in said complaint:

Eighth. The defendant alleges, upon information and belief, that the plaintiff was in the employ of the defendant as a coal miner and said employment was entered into by the plaintiff, and the relations of the plaintiff and defendant during the continuance of said employment

were controlled by the laws of the State of Pennsylvania; that said laws are statutes of the said State enacted at various times by the Legislature of the State of Pennsylvania, and are commonly known as the Anthracite Mining Laws, and that by virtue of the provisions of said statutes, the defendant is not liable on account of the injuries to the plaintiff as set forth in said complaint. That plaintiff's injuries, if caused or contributed to by the negligence of any other person than himself, were caused or contributed to by mine foremen and other employes of the defendant, for whose negligence defendant is not liable by virtue of the provisions of the said statutes. 115 116

For a sixth and separate defense to the cause of action set forth in said complaint:

Ninth. The defendant alleges, upon information and belief that the laws of the State of Pennsylvania referred to and described and quoted in subdivisions or paragraphs marked "XVI" and "XVIII" in said complaint are now and have been since their enactment unconstitutional and void in so far as said laws relate to the respective rights and liabilities of the parties to this action or to the issues in this action, in that said statutes deprive the defendant of its liberty and property without due process of law and are in violation of the provisions in the constitution of the Commonwealth of Pennsylvania known as the Bill of Rights, and are in violation of the provisions of the Constitution of the United States contained in the Fifth Amendment thereto, in that said statutes deprive the defendant of its liberty and property without due process of law and take defendant's private property for public use without just compensation; and contained in the Four- 117

118 teenth Amendment thereto, in that said statutes abridge the privileges and immunities of the defendant, deprive the defendant of liberty and property without due process of law, and denies to defendant the equal protection of the law.

For a seventh and separate defense to the cause of action set forth in said complaint:

119 Tenth. The defendant alleges that the plaintiff's alleged cause of action under the United States Statute entitled "an Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," and known as the Federal Employers' Liability Act of 1908, 35 United States Statutes at Large, 65, C. 149, accrued, if it ever accrued, on July 6th, 1911, and that plaintiff's said action was not commenced within two (2) years from the day the cause of action accrued and therefore cannot be maintained.

Wherefore, defendant demands that the complaint herein be dismissed with costs.

F. W. THOMSON,

W. S. JENNEY,

Attorneys for Defendant,

Office and Post Office Address,

No. 90 West Street,

Borough of Manhattan.

New York City.

120

State of New York, }
County of New York, }
City of New York, } ss.:

A. D. Chambers, being duly sworn, deposes and says: That he is the Secretary and Treasurer of the above named defendant, The Delaware, Lackawanna and Western Railroad Company; that he has read the foregoing answer and that it is true

Answer to Amended Complaint. 41

of his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true. 121

That the reason why this answer is not verified by the defendant, is that it is a foreign corporation, and that deponent is an officer thereof as aforesaid; that the sources of deponent's knowledge and the grounds of his belief as to all the matters therein not stated to be on knowledge, are statements and reports received from officers and agents of defendant, having in charge the matters referred to in said answer.

A. D. CHAMBERS. 122

Subscribed and sworn to before me }
this 3rd day of November, 1913. }

[SEAL.]

Joseph Fiell,
Notary Public,
New York County.

123

Extracts from Clerk's Minutes.

At a Stated Term of the United States
District Court for the Eastern
District of New York, held at the
Borough of Brooklyn, City of
New York, on the 30th day of
March, 1914.

Present—Honorable THOMAS I. CHATFIELD, Dis-
trict Judge.

MATT YURKONIS,
Plaintiff,

v.

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant.

The plaintiff appeared by Thomas J. O'Neill, at-
torney, and moved the trial of this cause; likewise
the defendant appeared by F. W. Thomson and J.
H. Oliver, attorneys, and thereupon a jury was
empanelled and the cause proceeded to trial. There-
after on the 31st day of March and April 1, 2, 3
and 4, 1914, after hearing the evidence for the re-
spective parties, the arguments of counsel, and the
charge of the Court, the jury retired, and on their
return rendered a verdict in favor of the plaintiff
in the sum of fifty thousand dollars. Thereupon
the Court denied the motion to set aside the ver-
dict and for a new trial, and granted a stay of 60
days after entry of judgment, and extended the
March Term, 1914, of the Court to June 1, 1914.

Extract from the minutes.

PERCY G. B. GILKES,
Clerk.

By J. G. Cochran,
Deputy Clerk.

Extract from Clerk's Minute Book.

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April 18th, 1914.

YURKONIS**v.****D., L. & W. R. R. Co.**

Motion to set aside verdict on the ground of its being excessive and for a new trial.

APPEARANCES:

128

No one for Defendant and the motion.

THOMAS J. O'NEILL and BALTRUS S.

YANKUS, for Plaintiff in opposition.

Absence of F. W. THOMSON, for Defendant and the motion noted.

Motion submitted, March Term, 1914, extended to August 1, 1914.

129

130

Alternative Order Reducing Verdict.

At a Stated Term of the United States District Court, in and for the Eastern District of New York, held at the Court House thereof, in the Post Office Building, in the Borough of Brooklyn, City and State of New York, on the 8th day of May, 1914.

Present—Honorable THOMAS I. CHATFIELD, District Judge.

131

MATT YURKONIS,
Plaintiff,

against

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant.

132

The above entitled action having come on regularly for trial in this Court, upon the 30th day of March, 1914, before the Honorable Thomas I. Chatfield, Judge, and a jury, and the jury having, on the 4th day of April, 1914, rendered a verdict in favor of the plaintiff, Matt Yurkonis, and against the defendant, The Delaware, Lackawanna and Western Railroad Company, in the sum of fifty thousand dollars (\$50,000.00), and a motion having been made by the defendant, upon the return of said verdict, to set the same aside on the ground, among others, that it was excessive, and the said motion having been duly heard, and after hearing F. W. Thomson, one of the defendant's attorneys, in support thereof, and Baltrus S. Yankus,

Esq., attorney for plaintiff, and Thomas J. O'Neill, Esq., of counsel for plaintiff, in opposition thereto, and due deliberation having been had thereon, it is 133

Ordered, that the plaintiff, through his attorney, Baltrus S. Yankus, Esq., file on or before May 12, 1914, with the Clerk of this Court, his consent in writing that the said verdict shall be reduced to the sum of thirty-six thousand dollars (\$36,000), or make some application with respect to the verdict for the amount in excess of that sum.

Enter,

THOMAS I. CHATFIELD,

Judge of the United States District Court. 134

Filed and entered May 8th, 1914.

136

Consent to Reduction of Verdict.
DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF NEW YORK.

MATT YURKONIS,
Plaintiff,

against

DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant.

137

The plaintiff above named, by his attorney, Baltrus S. Yankaus, the undersigned hereby consents that the verdict recovered by the plaintiff against the defendant in the above entitled action, in the sum of fifty thousand dollars (\$50,000) be reduced to the sum of thirty-six thousand dollars (\$36,000), in pursuance of the order made by Honorable Thomas I. Chatfield, District Judge on the 8th day of May, 1914.

Dated, New York, May 9th, 1914.

138

BALTRUS S. YANKAUS,
Attorney for Plaintiff.

Order Denying Motion for a New Trial.

139

At a Term of the United States District Court for the Eastern District of New York, held at the Court House in the United States Post Office Building, in the Borough of Brooklyn, City of New York, on the 12th day of May, 1914.

Present—Hon. THOMAS I. CHATFIELD, District Judge.

MATT YURKONIS,
Plaintiff,

against

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant.

140

The above-entitled action having regularly come on for trial before Hon. Thomas I. Chatfield, District Judge, and a jury on the 30th day of March, 1914, and the issues having been tried, and the jury having, on the 4th day of April, 1914, rendered a verdict upon the merits in favor of the plaintiff and against the defendant for the sum of fifty thousand dollars (\$50,000), and the defendant having immediately after the rendition of the said verdict, moved to set the same aside upon the ground, among others, that it was excessive, and the Court having entertained the said motion and having thereafter, and after due deliberation, rendered its decision in writing reducing the said verdict to the sum of thirty-six thousand dollars (\$36,000) and directing that if the plaintiff agrees and consents to the said reduction, then in all

141

48 Order Denying Motion for a New Trial.

- 142 other respects and upon all other grounds, the said motion be denied; and an order having thereupon and on the 8th day of May, 1914, been made requiring the plaintiff through his attorney to file on or before May 12th, 1914, with the clerk of this Court, his consent in writing that the said verdict shall be reduced to the sum of thirty-six thousand dollars (\$36,000), or otherwise to move with respect to the verdict for the amount in excess of that sum; and the plaintiff having thereafter and on the 9th day of May, 1914, through his attorney, filed with the clerk of this Court his consent in writing to the reduction of said verdict to the sum of thirty-six thousand dollars (\$36,000); now, upon
- 143 motion of Baltrus S. Yankaus, attorney for the plaintiff, it is

Ordered, that the said motion be, and the same hereby is in all other respects denied.

THOMAS I. CHATFIELD,
United States District Judge.

Judgment.

145

**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.**

MATT YURKONIS,
Plaintiff,

against

**DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,**
Defendant.

146

The above-entitled action having been regularly reached for trial before Hon. Thomas I. Chatfield, District Judge, and a jury on the 30th day of March, 1914, and the issues having been tried, and the jury having on the 4th day of April, 1914, rendered a verdict upon the merits in favor of the plaintiff and against the defendant for the sum of fifty thousand dollars (\$50,000); and the Court having thereafter reduced the said verdict to the sum of thirty-six thousand dollars (\$36,000) and the plaintiff having in writing consented to such reduction; and the costs and disbursements of the plaintiff having been duly taxed by the Clerk of this Court at the sum of ninety-nine and 80/100 dollars; it is on motion of Baltrus S. Yankans, attorney for the plaintiff,

147

Ordered and adjudged that the plaintiff, Matt Yurkonis, do recover of and from the defendant, The Delaware, Lackawanna & Western Railroad Company, the sum of thirty-six thousand dollars (\$36,000) damages, together with the sum of ninety-nine and 80/100 dollars costs, amounting in the aggregate to the sum of thirty-six thousand and

148 ninety-nine and 80/100 dollars, and that the plaintiff have execution therefor.

Judgment signed, entered and filed this 13th day of May, 1914.

By the Court,

PERCY G. B. GILKES,
Clerk.

By J. G. COCHRANE,
Deputy Clerk.

Bill of Exceptions.

UNITED STATES DISTRICT COURT,

149

EASTERN DISTRICT OF NEW YORK.

Before—Hon. THOMAS I. CHATFIELD, District Judge
and a jury.

MATT YURKONIS,
Plaintiff,

against

DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant.

150

This action was commenced originally in New York State Supreme Court, Richmond County, by the service of a summons and complaint upon the defendant on May 7, 1913. The case was removed to the United States District Court and the defendant filed its answer to the plaintiff's complaint on May 27, 1913.

Upon a formal motion made by the plaintiff on October 15, 1913, the Court permitted the plaintiff to serve an amended complaint.

Plaintiff's amended complaint was served on defendant on October 17, 1913. 151

Defendant's answer to said amended complaint was filed on November 3, 1913, and a copy thereof was served on plaintiff's attorney on November 6, 1913.

From the beginning of the action until September 18, 1913, one Charles Goldzier, Esq., of 115 Broadway, New York City was plaintiff's attorney of record. Upon September 18, 1913, an order of the Court substituting Baltrus S. Yankus, Esq., as attorney for the plaintiff in the place of Mr. Goldzier was served upon defendant's attorneys.

Defendant appeared by its attorneys, Mr. F. W. Thomson and Mr. W. S. Jenney. There have been no changes in attorneys or parties since the action was begun, except as hereinbefore described. 152

The trial of this case was commenced on March 25, 1914, and concluded on April 4, 1914.

Upon the trial the plaintiff appeared by Baltrus S. Yankus, Esq., his attorney and by Thomas J. O'Neill, Esq., of counsel, and the defendant appeared by Mr. F. W. Thomson, one of its attorneys, and by J. H. Oliver, Esq., of counsel.

In the course of the trial, counsel for the defendant did take and allege sundry exceptions to the rulings of the Court and to portions of the Court's charge to the jury and to the refusal of the Court to charge as requested by the defendant, which said exceptions are hereinafter set forth. 153

The jury having been duly empaneled and sworn, the case was opened to the Court and the jury on behalf of both plaintiff and defendant and the following proceedings were had, viz.:

Brooklyn, 25 March, 1914.

Case called for trial.

Plaintiff answered ready.

154 Defendant expects to be ready, except for a preliminary motion.

Mr. Thomsen: Before the jury is drawn I wish to make a motion to remove the case to the Middle District of Pennsylvania.

Motion opposed by Mr. O'Neill.

Motion denied.

Defendant excepts.

Full record to be supplied later.

The Court: Draw a juror.

Mr. Strohmeier drawn as foreman.

APPEARANCES:

155 B. S. YANKUS (Mr. O'NEILL) for the Plaintiff.

F. W. THOMSEN—W. S. JENNEY (Mr. THOMSEN) for the Defendant.

Adjourned till March 30, 1914, at 10:30 A. M.

JOHN J. CRONIN, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. O'Neill:

I am a physician and surgeon and have been such since 1893.

156 Q. State your professional education and qualifications? A. I graduated at the College of Physicians & Surgeons, New York University, Roosevelt Hospital, Seton Hospital, and am at present an officer in the Department of Health of the City of New York.

Q. Did you, at the request of Mr. Yankus make an examination of the body of this plaintiff? A. Yes, sir, I made that examination for the purpose of explaining his condition to the jury, and of course not for the purpose of treating him.

Q. When did you make the examination? A. I

think it was a week ago Sunday morning, on March the 22nd, 1914. 157

Q. What did you find his condition to be? A. A complete loss of sight due to the complete disruption of his eyeballs and all the mechanism that goes to make up sight; the eyeballs were completely blown out and the face was considerably disfigured and discolored.

Q. Did that discoloration or pitting cover practically all his forehead on both sides of his face and down on his chin? A. It includes the forehead, the eyebrows, face, cheeks, chin, lips and ears.

Q. What did you find with reference to his hand? A. I don't think I made any note of his hand. 158

Q. Please go down and look at it. A. I saw this, yes (looking at hand); a complete fracture of the middle finger at the junction of the metacarpel and the phalanged joint. It is above the knuckle. But the bone itself is broken; a portion of this (indicating) is attached by the ligaments, and you can see it at this side better. There isn't any dislocation here (indicating). You can feel the condition of the bone that articulates with the metacarpel bone here. And here is the end of the blown off piece of bone.

Q. What effect does that have on the hand? A. As far as the fingers are concerned it makes them useless. The appearance of the hand is badly deformed, but that has nothing to do with the third knuckle. I don't think the third knuckle had anything at all to do with the accident; the middle knuckle of the right hand was affected by it. 159

Q. At all events what deformity does exist in the third knuckle? A. He has got an ankylosed middle joint; the finger is absolutely useless.

Q. And the fourth? A. I don't think that is useless. If he had the use of the third knuckle

160 I think he could use it; but they are intimately connected so that that doesn't allow the little finger to operate properly.

Q. What about his right leg? A. At the junction of the middle and upper third of the leg there is evidence of compound fracture of both bones of the leg; with a permanent deformity.

Q. What do you find in reference to the left leg? A. Just above the kneecap there is evidence of a great big scar indicating a complete rupture of the front of the thigh, the muscles going together control the action of the leg. Those conditions are all permanent. In trying to walk, the left leg is
161 the one he swings.

Q. Is that because the leg is stiff or because the lower part of the—

A. He has no mechanical control of it. He has got the scar right clean across. The left leg is not stiff. It will move in normal directions if you move it forcibly; he has no control of it; it just hangs as a foot. If he is sitting down the foot would hang down on the ground; but nothing but gravity would make it assume one position or the other, he hasn't any power over it.

Q. What effect has the condition that you have described to both of his legs upon his ability to walk; and how does he walk? A. He can't walk.
162

Q. Well, does he shuffle around? A. He can't walk; he can't balance himself; he might possibly be made to balance, but he can't get from a sitting position with crutches and balance himself.

By the Court:

Q. Then whether he is either up on crutches or any other way he has to preserve his balance by the crutches? A. Exactly. His arms I think are all right.

Q. Can he preserve his balance when he is once up on his left leg and 2 crutches? A. I think he

can; in fact I know he can. I mean that he can with the two crutches, being placed in an upright position he can balance himself. 163

By Mr. O'Neill:

Q. Can he walk without assistance? A. I didn't test; but I will say no, he can't.

By the Court:

Q. He can make himself move, but he can't control his motions? A. Exactly.

By Mr. O'Neill:

Q. So that even with the crutches he needs somebody with him constantly to assist in balancing him and moving him about? A. Yes, sir. 164

Q. So far as his health and organs, etc., are concerned and his probable life—so far as his heart and lungs and kidneys are concerned, as to his probable life what did you find? A. I found him a perfectly normal man; his heart is normal and his pulse is regular, good and strong; he says his appetite is good and he sleeps well. His heart action is very regular. So far as his health is concerned there is nothing that I observed to prevent him from living to an ordinary ripe old age.

By the Court:

165

Q. Are his ears and nose normal and do they perform their functions? A. Yes; I don't know about the ears.

Q. Well, he can hear? A. I don't know whether he can hear; I didn't test him.

It is conceded that he can hear.

Q. How about the optic nerve physically? Not in the sense of conveying impressions. A. My opinion is that it is perfectly healthy, the mechanism to stimulate the optic nerve was destroyed.

166 Q. And the eyeball is destroyed? A. The eyeball is destroyed completely. There is no connection between the external world and the retina.

Q. But there is no injury or wound where the eyeball and the optic nerve join which at the present time is unhealed or is continuous? A. I think it is an injury to the cornea and the conjunctiva—that is, the covering of the eyeball; it is as if it had been cut off; there is no connection between the external world and his retina.

By Mr. O'Neill:

167 Q. And his eye sockets are not only empty, but they are open? A. They are open a bit; they are all disrupted; but they are there; he has to go through the motion of opening and shutting the lids.

Q. This deformity on his legs you observed? A. Yes.

Q. Is this man in constant need of an attendant, all the time? A. Yes.

Q. That condition of course is permanent? A. Yes.

By the Court:

168 Q. You find no evidence of any mental change? A. No; of course he is a foreigner, and I had an interpreter, as I had to question him through an interpreter.

Q. So far as you could observe he knows what he is doing? A. Yes, he seemed to be very keenly appreciative of it.

By Mr. O'Neill:

Q. That is, he appreciates his afflictions? A. Yes.

Mr. O'Neill: We have had some photographs taken of the man's condition so as

to present them on the record, not for the jury necessarily.

169

The Court: You can mark them for identification, so that they can be used if it is necessary to substantiate anything, and not show them to the jury unless some question is raised that makes it necessary.

They may be marked Exhibits 1 and 2 for identification, and if at any time we have to use them I will see about letting them go in evidence then.

By the Court:

Q. When you say he needs somebody to assist him you mean that he needs somebody to help him make physical motions? A. No; I mean somebody to act in the capacity of a valet; they have got to dress him and take care of him and wash him and bathe him.

170

Q. Do you mean that the man can't put on his own coat? A. Certainly he can't—not his coat; but to dress himself all through. He couldn't get his coat if it hung somewhere else, he wouldn't be able to see it. If you place the coat in his hands he can put it on. And if you give him his shirt he can put that on himself. His arms are all right.

Q. He can put his trousers on if he could see to locate the leg that hangs? A. No, I don't think he could; physically I don't believe he could.

171

Q. But having no eyes he at least needs somebody— A. He couldn't put his trousers on, regardless of his eyes.

By Mr. O'Neill:

Q. You have had something to do, I believe, and have some knowledge of the ordinary and reasonable charge which is made for an attendant of that character? A. I have never had much experience.

172 Q. Well, the ordinary charge. A. Well, the average man is pretty well in a position to pay \$25 or \$30 a week.

Q. That is to say, if this man was in a position to pay for a competent attendant that is what he would have to pay? A. That is what he would have to pay; I think a man like this would get along very well with a man for \$15 a week, but he wouldn't be a real assistant; he would be somebody who was not drilled in the work.

Q. About the matter of pain; is this man's condition an efficient producing cause of pain? A. No.

173 Q. In the leg? A. No, sir.

Q. When he goes about? A. No, sir.

Q. Do you think that he has no pain from that leg? A. No, sir.

Q. Because he has so little movement of it? A. That is the idea; it is fixed; it is ankylosed.

Q. That is one leg; are both legs ankylosed? A. No; I am talking about the fractures where the bone remains so, that is ankylosed.

Q. Wouldn't he have any pain from the severed tendon? A. No, I don't believe there is motion enough to give him any pain.

Cross examined by Mr. Thomsen:

174

My residence is 317 West 55th Street, Manhattan. I made this examination of the plaintiff the 22nd day of March, 1914. That is the only time I have ever seen him except now in Court. That is the first time until today. I noted in my examination the dark colored marks on the plaintiff's face.

Q. What caused those? A. As far as a city man knows, they are powder marks.

Q. What do you mean by a city man? A. Well, we don't know—

Q. Do you mean a city physician? A. Yes; we don't see very much of those except on the 4th of July; blank cartridges, and marks by explosives seem exactly similar to that. In my judgment I would say they were only powder marks, due to a powder explosion. 175

Q. Are there any scars from burns on this man's face, I mean from flame? A. Marks like burns? No, sir, I didn't see any.

Q. Any loss of skin from any scar? A. Except on his scalp, that I noticed this condition of loss of tissue at the top part of the skull there, a triangular place, right at the junction of the left and right, a bald spot. 176

Q. Point it out to me. I can't see it. A. Well, it is there (indicating). There is a loss of tissue on the skin, a considerable loss of tissue.

Q. The skin is there, isn't it? A. There is no true skin there at all.

Q. How big a place is there no true skin on top of his head? A. I should say about $\frac{3}{8}$ of an inch wide and about two inches long and a triangle about an inch long on the right hand end of the triangle.

Q. Is that all the true skin missing from the top of his head? A. That is what I figure.

Q. You can see, and can't you say yes or no? A. That is what I am saying; yes. 177

Q. Any on his face? A. No, sir.

Q. Any on his chest? A. No, sir.

Q. Then from your examination the only loss of what you call true skin from the plaintiff's body is the spot that you have just described on top of his head which is $\frac{3}{8}$ of an inch wide and a certain length that you have stated; is that true? A. No, sir; I didn't say anything at all about the loss of skin on his leg.

178 Q. I mean apart from that. On his upper body?
A. That is all with reference to his scalp, yes.

Q. And his trunk? A. Yes, except—

Q. That is true of his trunk and his head? A. Yes, except a linear scar on his finger; that I didn't measure; that is a linear scar.

Q. All the marks which appear on the plaintiff's head are all discolored with black powder, are they not? A. It is discolored—

Q. And in your judgment are those marks caused by black powder? A. They look like black powder, or I don't say black powder; it is powder.

179 Q. You say now that you think they were caused by powder marks, but you don't want to testify as to the quality of the powder? A. I didn't say so; I said they looked like powder marks.

Q. In your opinion they are powder marks? A. They look exactly like powder marks; they could be caused by powder.

Q. I didn't ask you that. I am asking for your opinion. In your opinion were they or not powder marks? A. I don't know the cause.

Q. I am not asking you whether you know the cause or not. A. I shan't testify till I know the cause.

180 Q. You shan't testify as to your opinion? A. No.

By the Court:

Q. That is, you mean that you have no opinion except that they look like powder marks? A. Exactly.

By Mr. Thomsen:

Q. Are there any discolorations that you found in the rear of the plaintiff's head? A. No, sir, I didn't.

Q. Or in the back of his neck? A. Except that everything is scarred all over.

Q. I am asking for what you found. A. I answer no. 181

Q. I would like to have you come down here and look at the plaintiff? A. Yes, sir (witness does as requested).

Q. Are there any discolorations in the rear of the plaintiff's head like those on his face? A. There is one behind the ear.

Q. How big is that? A. A spot.

Q. How big is the spot? A. I should say about one-eighth of an inch in diameter. I found no others. I found some in front of his ears; more on the left side than on the right; and the ears are more marked by these discolorations than the first two inches and a half of the scar in front of the ear on his face and about the same on the left side; there is more on the face than there is on the right ear; they are about the same, the aggregate; if you should coalesce all the spots on the face there is almost twice as much on the ear; if you get all the individual spots and put them together. 182

Q. The discolorations are thick on his face and around his nose, and become less as they go back? A. No, sir; a powder mark, if it is a powder mark always remains.

Q. I mean they are thicker on the front of his face than on the side? A. Oh, yes, sir, yes, sir. 183

Redirect examination by Mr. O'Neill:

These discolored marks on the face may also be due to a pigmentation of the skin as the result of coal or coal dust being driven into the skin itself by some explosive force. All that is necessary to do to make these marks is to have the pigment discoloration driven with sufficient force into the skin itself. I don't, of course, pretend to know how this accident happened, or anything about it. It may have been particles of coal driven in there originally by any explosion.

184 Q. Have you had any experience with powder marks except as you say such as have been made by blank cartridges on the 4th of July? A. Except coal, as we used to play in the coal and prick it into our hands; I did as a kid; we would prick in the coal, and I know the coal would cause a bluish discoloration.

Mr. O'Neill: I assume that we may consider that the Employers' Liability Act of the State of Pennsylvania and the Anthracite Mining Laws are before the Court.

185 The Court: I will take notice of them; but I think that the sections to which you wish to refer you had better either mention or read, so that they may be conveniently with the record.

Mr. O'Neill: I read Sections 1, 2 and 3 of the Employers' Liability Act, approved June 10, 1907, and Article 10 of the Anthracite Mining Laws of 1909, as codified by the State of Pennsylvania, including Sections 1 and 8 of said Article.

The Court: Let the Clerk mark as exhibits the paper from which you have made those references.

186 There being no objection as to the correctness of the printed copy in Court, the Clerk marks them Exhibits 3 and 4 for identification.

Mr. O'Neill: I also offer Rule I of Article 12 of said Anthracite Mining Laws, and Rules 8 and 9 as referred to in the complaint, and Section 8 of Article 17, as referred to in Subdivision 18 of the complaint, those sections being in Exhibit 4.

Mr. O'Neill reads sections to Court and jury.

Mr. O'Neill: This is a statutory law existing in Pennsylvania, on which the plaintiff relies.

187

(Reads law to Court and jury.)

Mr. Thomsen: I don't exactly see the object of reading the statute to the jury, if the Court takes judicial notice of it. I think it should be left to the Judge to charge the jury what the law is.

Mr. O'Neill: I am reading the whole law, and certainly the reading of a plain law to the jury can't affect them. The jury of course understand that the Court will construe that afterwards; but it is perfectly proper that the jury should know the plaintiff's cause of action.

188

The Court: You may read it into the record, but the jury will understand that unless it is afterwards read to them with the statement that it has some application, it isn't to be used by the jury. It isn't evidence in the case unless it bears on the case.

Defendant excepts.

Mr. O'Neill: I will read this plain law without any comment.

Mr. O'Neill reads Section 1 of said law.

189

(Reading): "Section 2:—"

Mr. Thomsen: That section is not the law of the State of Pennsylvania, because the Supreme Court of the State of Pennsylvania has held it to be unconstitutional, and as immaterial and irrelevant, and is not the law.

The Court: If it is part of the statute as construed by the Court I shall have to cover that and withdraw the part that may not be used. You may go on and read it.

190

Defendant excepts to the reading of the unconstitutional part of it.

Mr. O'Neill reads Section 2.

Mr. O'Neill: I read into the record also the following laws and rules which are part of the Anthracite Mining Laws of the Commonwealth of Pennsylvania, as codified by that State and put into distribution in 1909.

Mr. O'Neill reads part of the laws and rules.

Mr. Thomsen: I object to Mr. O'Neill reading only part of the rule.

191

The Court: If the section is read into the record you will have to read it in its entirety.

Mr. O'Neill reads the whole rule.

Mr. O'Neill: I also read Section 8 of Article 10 on page 26 (reads).

MATT YURKONIS, having been duly sworn, testifies through an interpreter, Clement Wilkenvich:

By Mr. O'Neill:

192

My name is Matt Yurkonis. And I am the man that is bringing this action against the company. On July 6, 1911, I was injured while in the employ of the defendant Railroad Company at its Pettibone Mine, Pennsylvania. I am 50 years old. When I was working down there for this company in the mines I was paid every two weeks.

Q. How much would you make for yourself in two weeks? A. If I worked every day I made \$75.

Q. Did you make \$70 sometimes? A. Yes.

Q. And sometimes \$65? A. Oh, if I didn't work every day. And sometimes I have made as low as \$40 and even \$30 for every two weeks, but I don't work every day then; about three or four days I would be working. 193

Q. About how much were you earning every two weeks on the average? A. I would make \$900 or \$1,000 a year, but I never figured.

That is by the year. I was in good condition of health before I was injured.

Q. Was there anything the matter with your eyes or your hands or your legs? A. No, there was nothing the matter.

Q. And you have received no other injury to your face or eyes or legs or hand since then, this day that you were hurt in the mine, is that right? A. I never was injured since that time. So the condition which I am in today is the result of the injuries which I sustained on the 6th day of July, 1911. I am a citizen of the United States. 194

Q. You have been a citizen for how long? A. I can't tell how long.

Q. About how many years? A. Well, about 10 or 12 years, maybe more; I can't tell exactly. I worked 18 years for the company in this mine. Not always in the same place, but in different places. Not in the breaker, but in the mine itself. I know a man on that job named Bill Powell. He was there at that time that I got hurt. When I worked down in that mine Bill Powell gave me and the other workmen orders and told us what to do. I knew another man down in that mine called Jack Davis. When I and the other workmen worked down in that mine before I was hurt Jack Davis also gave us men orders. In a mine there is what is known as gangways which the men go up and down to and from their work, and leading off from 195

196 these gangways there are what is known as working places. A working place is a place in which you go off the gangway and mine out the coal and take it out in cars. And further along the gangway there will be another working place, and then from one working place into another they make what is known as cross cuts, between one working place and the other, and these cross cuts are usually made by one miner driving from one side and another miner driving from the other side until they meet.

By the Court:

197 Q. Are those cross cuts made after the gangways are completed, or are they made at the heads of the gangways while you are working on the coal?
A. Those places are worked out further after making the crossing.

By Mr. O'Neill:

Q. The cross cut doesn't lead from the gangway, does it? It leads from the working place. Is that right? Does it connect two gangways or does it connect two working places? A. They connect the two working places.

By the Court:

198 Q. Then what is the difference between the gangway and the working place? Does one have car tracks and the other not, or do they both have car tracks? A. When they work further they make a door.

By Mr. O'Neill:

Q. Is a gangway more like a long avenue and the working places like side roads off from the gangway? A. Yes. In the gangway they have tracks.

By the Court:

199

Q. Do they have those in the working places? A. They put sometimes iron and sometimes wooden.

Q. And then take them out when they get ready to go to the next working place? A. They take them out, or a man working day work. They leave the track in the gangway all the while. Then off at each side of the gangway they connect these side working places by cross cuts, they connect the working places.

By Mr. O'Neill:

Q. When a workman reports for work in the morning upon the surface of the earth before he goes into the mine, where does he go; to what office does he go and what does he ask? A. I ask every morning and call a number. Every morning I went to some office or some window outside, and I called out a number, 38, or what I have got. We call out the number of whatever working place we are going to.

200

Q. Why do you call that out? A. I call out a number and ask if it is all right and the bosses say, "All right, you go to work."

Q. And is there, in that place where you ask whether everything is all right, is there not only Jack Davis but also the boss who weighs the coal?

201

A. Yes; there was another boss there. And if your working place is all right and there is no gas in it, then they tell you "All right." If there is gas in your working place they tell you that there is gas there. So that before any man goes into the mine he goes to the window of the office and he calls out to the foreman—in this case Jack Davis—and asks him 38, whether it is all right, and then he answers whether it is all right that day or not,

202 and if he says "No, there is gas," then you can't go in.

Mr. Thomsen: Mr. O'Neill is probably not absolutely familiar with the situation of this mine and he speaks of Mr. Davis as being a foreman.

The Court: Don't use the word "foreman." The witness said there is a boss, Jack Davis. I will sustain the objection to the word "foreman;" use the word "boss."

203 Q. Jack Davis is the man; is that right? A. Yes. If he tells you that it is all right then you can go into the mine with an open lamp, like this (indicating). That is an open lamp. That is the kind of a lamp which is used by all the miners and taken by them into the mine when the boss tells them that it is all right, when they call out their number.

The open lamp that is used for the bat is offered in evidence.

It is marked Exhibit 5.

204 Q. If he tells you that it is not all right and that there is gas, but that nevertheless he wants you to go down in the mine, does he take this open lamp away from you and give you a closed glass lamp? A. Yes.

Mr. Thomsen: Objected to as leading.

The Court: Well, change the question; if there is gas what does he do?

Q. If there is gas what does the boss do with you, or tell you? A. Well, he says, "You don't go in the place and wait till the company man builds a brattice."

Q. Then after the company man builds a brattice

and you are to go into the mine what does he do with your open lamp? A. Well, he examines the place and if he says it is all right we go in. 205

Q. If there is any gas at all then does he let you go in with an open lamp? A. Yes. If there is gas in the mine the boss does not let the miner or the workman go in with an open lamp. When there is gas in the mine, the boss takes away the open lamp and we take the closed lamp. The closed lamp belongs to the company. And the safety lamp is also owned by the company.

Q. How many kinds of lamps are there? You have got first the open lamp? A. Yes.

Q. And then is there another lamp like the one I now hand you? A. Yes, that is a safety lamp, a safe lamp. 206

The safety lamp is offered in evidence.
It is marked Exhibit 6.

Q. Besides the open lamp and the safe lamp is there also an open glass lamp owned by the company? A. They use a glass lamp, a closed glass lamp. So there are three kinds of lamps. A closed glass lamp and the safety lamp are owned by the company. At this particular mine when I would use the closed glass lamp, the company would give it to me. 207

The Court: Now, I should like to have you go back to the question about his going into the mine when there is gas.

By the Court:

I said if there was gas there they would tell me not to go in until they had built that brattice; and then they let me go in when there wasn't any gas.

Q. If you waited till the gas was out and used your ordinary lamp then what would you be doing

208 at all with the safety lamp or with the glass lamp? What would you be doing when Mr. Davis told you not to go into the mine until the gas was out or the brattice was built? Why would you have any use for the safety lamp or the closed glass lamp?

By Mr. O'Neill:

Q. Even after the brattice is built does gas come out at different times, and is that why it is inspected every day, to see whether there is gas? A. I go to the window and ask him if the place is all right or not; they say if it is all right I can go, but if not I can't go into the mine.

209 By the Court:

Q. Then when do you have to use any lamp except the open lamp, if they won't let you go in until the place is safe? A. If there is in the mine gas we have to take glass lamps and go to the mine.

By Mr. O'Neill:

Q. Even after the brattice is built is the mine inspected every day to see whether or not there is gas there? A. When I am out of the mine I can see if they inspect the place or not; I never see if the place is inspected.

210

Mr. Yankus: The Mine Law of Pennsylvania requires an inspection to be made by either a mine foreman or his assistant every day.

The Court: You are presumed to obey the law, but whether or not it is done has no effect on this case yet. Swear a miner.

The plaintiff is temporarily withdrawn to enable another witness to explain the use of the mine.

ANICET B. STRIMAITIS, being duly sworn and examined as a witness for the plaintiff, testifies: 211

By Mr. O'Neill:

I have been a miner in anthracite mines in Pennsylvania for eleven years. When there is gas in a mine, a brattice is built for the purpose of conducting ventilation to the lower workings.

Q. But even after the brattice is built is the mine inspected every day to see whether or not there is gas? A. It is supposed to be.

Q. Well, I mean that is the presumption? A. Yes. And then after the brattice is built and before the miner goes down he goes to the window and calls out the number of his working place and is told by the boss whether his working place has gas in it or not. 212

Q. After the brattice is built and when he inquires whether there is gas in his working place, and if there is gas and they desire him to go into the mine do they take his open lamp away from him? A. Not always.

By the Court:

Q. What number does the miner call out? His own number or the number of the working place? A. The number of the working place. They go back from day to day to the same working place so long as they are working in the same locality. At night they go home, and when they come back in the morning they go to work in the same place unless they change. 213

Q. Then the only reason that they call the number out in this particular mine that you are testifying about is to get a report on gas? A. And also as to the safety of the place; not only for the matter of gas, but for all the safety of the place they

214 call the number. That is, it is to know whether they can go on and go to work in the place where they knock off the night before. It hasn't anything to do with their time or checking them up.

Q. What is a brattice? A. A brattice, it is to conduct pure air into the working place.

Q. Say a pipe or a wall? A. It is generally built alongside of a pillar leading to the working place.

By Mr. O'Neill:

Q. Is it a section of boards which is placed opposite the rib in the walls? A. Yes, sir.

215 By the Court:

Q. How do they use it? A. Well, when they have a crosscut opened they put the brattice on the lower side of the crosscut and leave that up to the face of the working place, to give air, into the face of the working place.

Q. Does that brattice entirely stop off the passage into the tunnel that before that led down to where this crossing is? A. You mean into the crosscut, not into the tunnel?

By Mr. O'Neill:

216 Q. The Court wants to know whether the brattice takes up the entire working place, or does it take up part of the working place? A. Just a small part alongside of the rib to travel air through and the rest of the place is open.

By the Court:

Q. Where do the miners go to get to their work? A. Down the shaft or the slopes.

Q. How do they get to the working place; through the crosscut or through the same place that they went out the night before? A. Yes, out

of the gangway in their working place. The gangway leads to the work place and then he gets into the work place. He goes in to work. The gas is in the face of the working place.

217

Q. And what is the face of the working place?

A. Where they are getting coal, the solid coal is called the space and where they are getting the coal is a regular working place, a driving in the solid coal.

By Mr. O'Neill:

Q. The gas which the object of the brattice is to dissipate and drive away, the gas comes from the coal itself, does it? A. Yes.

Q. And the brattice is for the purpose of conducting fresh air from the outside down into the gangway and the working places, the crosscuts? A. Yes.

218

Q. And the brattice itself then is a sort of conduit into which fresh air is carried from the gangway into the working place and in through the crosscuts? A. Yes.

Q. And when you refer to the face of a working place or the face of a crosscut you mean the solid wall of coal? A. Yes. A brattice, if I can show you, it is built against a wall; for instance, this door would be our crosscuts, and the brattice begins at the lower side of the door.

219

Q. If the door is the crosscut where is the face? A. Right up to the other door. The working place will be as that door there (indicating) and the crosscut will be here and the brattice is built from the lower side of the crosscut and built alongside of the wall. This is the pillar (illustrating); the wall; we go as far as that door; that is the face of the place, solid coal. You begin to drive another crosscut where the door is near this room and

220 you drive maybe 15 or 25 feet into the solid coal. With the brattice the air comes through this door and checks up with the brattice alongside of the pillar, they are bound to give them in the face of the working place, and if it is necessary a brattice has got to be turned into the crosscut where the miners are working, every 25 feet into the solid pillar.

Q. Does the brattice come up from the floor of the mine and is carried over to the side wall so that it is a closed space? A. Yes, sir, it is props, leans up against the pillar or up into the top, and closed with boards along to the bottom, and air-tight with a canvas or plaster.

221

Q. Then whatever the height of the brattice is, it is a completely tight partition or wall either between the floor and the top or ceiling, or the floor and the side? A. Yes, your Honor.

Witness indicates that one crosscut in the position of the side door to the Court Room, and the working place was extending along at right angles to the crosscut, and the face of the coal the other side of the room, the second crosscut referred to, being the position of the door out of the Court Room near the opposite wall, referring in this case to the side wall.

222

By Mr. O'Neill:

Q. Is it usual and customary for these brattices to be turned into the crosscuts so as to conduct air into the crosscuts and the face of the crosscut which is being blasted? A. With a crosscut in about 25 to 30 feet from one side of the pillar, as they usually do, they require a brattice to the crosscut; otherwise you wouldn't get any air or any gas out.

Q. You wouldn't get good air? A. No.

223

Q. And how far in such a case is the brattice carried into the crosscut? A. It is just as close to the face of a working place as is required to take bad air and gas out.

Q. Well, how far? 10 feet? A. No, 6 feet; if the air is strong you don't require a brattice as close to the face; but if the air is leaking some place, or the air is not strong then the brattice is required further into the face.

By the Court:

Q. But the pure air that is carried in is taken under this brattice? A. Yes.

Q. Where does the gas, the impure air, get out? A. Well, when we work a place—this way; well, there is a solid rib on the other side, of coal; and when the air goes into the face of the working place they have got to travel back on the other side of the rib and wherever they find a hole driven on that side the air goes in and circulates all the mine that way.

224

Q. Then you force air in through this brattice as you would blow in a bottle? A. Almost.

By Mr. O'Neill:

Q. You say whenever the crosscut is cut in 20 or 25 feet then the brattice is turned into the crosscut and brought up to about 6 or 10 feet from the base of the crosscut? A. Yes.

225

Q. And that is the usual customary way of building these brattices, is it? A. Yes, sir, where there are no doors.

Q. That is, no doors at the crosscut? A. No.

Q. And the crosscut; what is its ordinary width? A. Well, a crosscut is never less than 6 feet wide and they could be as wide as the foreman or the boss instructs to drive.

226 Q. How high? A. It just depends on how big a face is; 6 feet or 5 feet, or whatever it is, from the bottom to the top.

Q. It depends upon the size of the face? A. It does.

Q. If it is as wide as 12 feet that makes the necessity of carrying the brattice into the crosscut all the greater does it? A. Yes, sir.

Q. What is the ordinary distance between crosscuts? A. Do you mean from one crosscut to another?

227 Q. Yes, on the working place as you go along and as you get one crosscut and then come out in the working place and drive through the working place, and before you go into the crosscut again what is the distance? A. From the lower side 60 feet up to the face to start another crosscut.

Q. And if they are 75 feet apart does that, to any extent, interfere with the ventilation? A. Oh, I should say it would.

Q. Why? A. Well, it takes a longer space of brattice, which is practically always leaking some; if you take 15 feet more of brattice, that is, from 60 to 75, it would be 15 feet more brattice.

By Mr. O'Neill:

228 Q. This diagram that I now show you is not proved that it is exactly accurate, but it shows a gangway which is a main avenue of travel in the mine. Is that right? A. Yes.

Q. The parts that are practically at right angles are what are known as working places; is that right? A. Yes.

Q. Then at right angles or almost at right angles with the working places the crosscuts are driven through. Is that correct? A. Yes, sir; the air—

Q. And as each crosscut is cut through it is

usual and customary to close it up with building stone and cement; is that correct? A. Yes, sir. 229

The diagram is marked Exhibit 7 for identification.

Q. Assume that a brattice was carried along the working place, but was not carried up to the edge of the crosscut but was stopped about 10 or 15 feet away from the crosscut, and of course was not carried into the crosscut itself; would that be an unusual construction and what would be the effect of that? A. Well, I should say that the miners couldn't enter the working place at all in the crosscut if there is any gas in the place. In some places there is no gas, but if there is any gas the miners couldn't enter. Of course, there is no way to get the air into that working place. 230

Q. But if gas did come there suddenly the brattice, which ended 15 feet away from the edge of the crosscut, would have but little effect inside the crosscut? A. It wouldn't have any effect at all. It would go right straight out. The air wouldn't curve inside of the crosscut; it wouldn't have any effect at all.

Q. But at all events you say that the brattice should be turned into the crosscut? A. Yes, sir.

Q. And down in these mines do they have what is known as an open lamp? A. Yes, sir. 231

Q. Such as I now show you, Exhibit 5? A. Yes.

Q. And also a safety lamp known as Exhibit 6? A. Yes.

Q. And do they also have what is known as a closed glass lamp? A. Yes.

By the Court:

Q. The crosscuts are in the coal? A. Yes, sir.

232 Q. And the coal that they take out while making the crosscut is mined; that is, it is taken out in the cars? A. Yes, it would be shifted out into the working place, and then is loaded in cars and taken out.

Q. While they are building a crosscut there are then two faces coming from opposite directions where they are mining coal until they meet; so as to make the crosscut? A. Yes.

Q. What are these marks that you have made across the crosscuts? A. That is where they meet.

By Mr. O'Neill:

233 Q. After they make the crosscut complete and the two miners going in opposite directions meet, then you say that that crosscut is blocked up by building stones and cement, as the law requires? A. Yes, sir.

Q. It is about in the center of the crosscut that that is put? A. Yes, sir.

Q. In other words they don't block up the crosscut, or each end, but they save one partition by putting the partition in the center. Is that correct? A. Yes, sir.

234 Q. So that if a man goes to the man in the morning and calls out his number and he is told that the gas is all right, then he has his safety lamp on his belt, does he? A. Yes.

Q. And he has his open lamp on his cap? A. Yes, sir.

Q. And he goes into the mine? A. Yes, sir.

By the Court:

Q. Which is lighted, or both? A. Both.

By Mr. O'Neill:

Q. And if there is any gas in the mine and they

nevertheless want him to go into the mine, they take this open lamp away from him? A. Not always. 235

Q. Well, you mean sometimes they are negligent and forget it? A. No, they generally leave the open lamp to take along, and also the safty lamp.

Q. Both lighted? A. Both lighted. If the place is inspected and they say it is all right.

Q. But suppose it is inspected and the boss says, "I want you to go down there but I want you to take only the safety lamp, and the closed lamp, then you obey his instructions? A. Yes.

Q. In other words a man going into a mine relies entirely upon the report that he gets at the window as to what he must take with him; is that right? A. Yes. 236

By the Court:

Q. Sometimes, if there is no reason for using the safety lamp the men go ahead with an ordinary lamp? A. Yes, sir.

Q. Sometimes, even if there is a report of gas they go in and work with the safety lamp? A. There is places that they don't allow open lamps entirely; they work all the time with safeties.

Q. Then they do work in places with a safety lamp where there is gas? A. Yes, sir.

Q. And not with the open lamp? A. And not with the open lamp. 237

By Mr. O'Neill:

Q. But if a man is told that there is no gas then he takes the safeties? A. Yes, sir.

By the Court:

Q. Every day? A. Yes, sir, every day, lit; if there is gas in the place; where the coal is gassy.

238 By Mr. O'Neill:

Q. If some defect comes in the brattice or in the air in a gaseous mine that gas is illuminated instantly, in a few seconds? A. Yes, sir, as soon as the door opens outside, in a minute our working place is full of gas if they neglect to close the door.

Q. Or if the partition might fall down the gas would come in almost instantly; is that right? A. Yes, sir.

239 Q. There are three lamps, a safety lamp like Exhibit 6, an open lamp such as Exhibit 5 and also what is known as a closed glass lamp? A. Yes, sir.

Q. And the closed glass lamp and the safety lamp are the property of the company, is that correct? A. Yes.

Q. But when a man goes in with an open lamp that is an assurance to him that it is safe to go there; that there is no gas? A. Yes, sir.

No Cross examination.

MATT YURKONIS resumes the stand:

Direct examination resumed by Mr. O'Neill:

240 Q. In what crosscut from the gangway were you injured? What was its number? A. No. 6 crosscut. And my working place, I think it was number 38. It seems as if it was 38, but I am not sure.

Q. What was the width of the working place which led off from the gangway? How wide was it? A. 20 feet.

Q. And how high was the working place? A. Sometimes it was about 7 feet and sometimes 6.

Q. After you drove in the working place a cer-

tain distance were you told to make a crosscut and if so, who told you? A. Jack Davis came and marked on the pillar and measured 75 feet, and if we had driven 75 feet he told me to drive a crosscut; we were there and Jack Davis came in and said 75 feet.

241

Q. How wide were the crosscuts that you then drove off from the working place? A. I can't tell exactly, but 10 or 12 feet wide.

Q. How high were they? A. Well, 5 feet; more than 5 feet; pretty near 6 feet.

Q. Did you drive your side of all of these 6 crosscuts? A. Yes.

Q. You drove your side? A. Yes.

242

Q. But the first five crosscuts did you drive them alone, or was there another miner who drove from another working place towards you till you met? A. There was another miner.

Q. The sixth crosscut in which you were injured, was there any other miner driving towards you or were you driving that crosscut alone? A. I drove that crosscut alone.

Q. Who was it told you to drive it alone? A. Well, the bosses.

Q. What is the name of the man? A. Well, Jack Davis and Bill Powell; both of them.

Q. Were each of these crosscuts 75 feet apart. A. Yes.

243

Q. Who told you to make them 75 feet apart? A. Well, both; Jack Davis came in and said 75 feet, and he marked a place to start the crosscut.

Q. As you came off the gangway you would first drive the working place and then go into a crosscut, and after the crosscut would be made you would come back to the working place and continue to drive on the working place and then make another crosscut? A. Yes.

244 Q. And then come back to the working place and drive through the working place again, and then make another crosscut? A. Yes.

Q. And so on to the sixth? A. Yes.

Q. How far had you driven this sixth crosscut the day you were hurt? A. Well, 36 feet.

Q. And on account of your driving this sixth crosscut all alone was that furthest in from the working place that you yourself had been while driving the other crosscuts? Were you in further in the 6th crosscut than you had been in the first, second, third, fourth or fifth? Had you passed where would have been the middle? Did
245 you have to drive that one further than you had driven any of the others yourself, because nobody met you? A. In that crosscut—

Mr. O'Neill: I think we will have to use the interpreter from now on.

The Court: Just ask this question. In the sixth crosscut had you gotten by where there would have been a meeting place if there had been some one working from the other direction?

The Witness: Well, I worked in one, but nobody was working from the other side.

246 Q. Therefore had you got by where you would have met him if he had been on the other side, if he had been working? A. I was further than on the other five, I made from the other side.

Q. In other words, the regular crosscuts, the other five crosscuts, and all of the crosscuts were 50 feet from one working place to another? A. Yes.

Q. So that ordinarily on the other five you only had to go 25 feet, but this one you were 36? A. Yes.

Q. On your side of the first, second and third cross cuts how did you blast the coal? With what did you blast the coal? A. I blasted it with batteries, dynamite and explosive caps. That is what I used; I used it with a glass lamp. 247

Q. You didn't have an open lamp in the first, second and third cross cuts? A. No.

Q. Who furnished the dynamite? The company? A. The company.

Q. And the caps? A. Yes, and the wires.

Q. And the wires, and battery, who owns those? A. Well, the wires, the company.

Q. Why didn't you do all the cross cuts with batteries and dynamite? A. Well, the boss stopped it. 248

Q. Who stopped it? A. Jack Davis and Bill Powell.

Q. What did Jack Davis tell you about that? A. Well, he said, "You can work with the black powder and use the squibs and use the open lamp; but stop the wires and explosives."

Q. Do you mean dynamite? A. Yes; he said, "It is too much expense for the company;" that is what he told to me.

Q. Did he say what the dynamite did to the coal? A. Well, he said it smashed the coal.

Q. Crushed it too much? A. Yes; that is what he said to me; to stop work with the dynamite. 249

Q. So that the first, second and third cross cuts were driven through by blasting with dynamite, but the fourth, fifth and sixth cross cuts were done by black powder and a squib? A. Yes.

Q. And he told you you could use the open lamp? A. Yes.

Q. Did he take his batteries and wires away after the third cross cut? A. Yes.

Q. When you have wires and dynamite and caps before you set off the dynamite do you go complete-

250 ly out of the cross cut and go to a good distance away before you set off the battery? A. I always go on the cross cut.

Q. You go into another cross cut? A. Yes.

Q. In other words, you go out of your own cross cut and go down in the working place and go into another cross cut when you have wires? A. Yes.

Q. And then you can blast the coal in safety? A. Yes, that is right.

Q. When the first, second and third cross cuts were finished and the coal was removed from them, were they closed up, and if so, by what? A. By rocks and cement.

251 Q. Were they closed up in the center of these cross cuts? A. Yes.

Q. When the fourth cross cut was finished how was that closed up in the center? A. Just put the, turned it up with planks.

Q. They didn't put any rocks and cement in the fourth cross cut? A. No; after I got hurt there they did.

Q. But up to the time you got hurt they had nothing there but these planks, you say? A. Yes; in, over in those planks were holes and sometimes they get loose and fall over.

252 Q. How long were those planks—that plank partition, in the fourth cross cut, before you were hurt? How many months? A. I can't tell exactly; but over 3 months.

Q. The 5th cross cut, when that was cut through was anything put through that at all? A. No.

Q. Then the ordinary current of air didn't come through your working place, but came through the opposite working place, and was carried through from the other working place, through the fifth cross cut into your working place; is that right? A. Yes; the only air came up by the fifth cross cut to my place.

Q. And it came in from the other working place into yours into your working place? A. Yes, it came from the other working place.

253

Q. Was there a brattice between the fifth and sixth cross cuts in your working place, and if so how near to the edge of the sixth cross cut did it come; that is, the working place side? A. Well, about 15 or 16 feet. Well, altogether I count about 50 feet from the face of the cross cut it didn't turn in.

Q. Not only did it not turn into your cross cut, but you say it only came about 16 feet from the edge of your cross cut? A. Yes.

Q. And that condition existed for how long before you were hurt? A. For about 6 or 7 days and may be more, I couldn't tell you exactly, I was working in this particular cross cut.

254

Q. And during all that time the brattice didn't go into the cross cut at all? A. No.

Q. And only came within 16 feet of the edge; is that right? A. Yes.

Q. During the couple of months that this north and south partition was in the fourth cross cut tell the jury what happened to those planks, what you saw and what holes there were, if any, and what was done about it? A. Well, sometimes they fell down on the ground.

255

Q. The boards? A. The boards, the brattice; it would loosen the cap piece on top and the boards would fall down to the ground. But if I found it I would stand up and fix it myself and it was done tight, not only up to the wall; there was a hole 4 or 5 inches was the hole; that hole I tied up with rags.

Q. After you would fix up these boards and would fill up some of the holes with rags would blasting again make the planks loose? A. Some fellow would fire and would shake up the mine and they would loosen again.

256

Mr. Thomsen: I object on the ground that counsel is leading, and suggesting all the answers as he puts the questions.

Q. Tell us then what effect the blasting would have upon these boards which you would put back, and the holes in which the rags had been put? What effect would the blasting have?

The Court: Limit it to the actual condition at the time he was hurt.

Mr. O'Neill: I mean before.

257

The Court: Well, limit it to the question what had been this particular condition when the blasts had been put off.

A. When a man on another crosscut would shoot the fire they shook the mine and the cap piece would get loose and the boards would come off again.

By the Court:

Q. How was it put up again? A. They would take it from the mine and stand it up again.

Q. Who did it? A. Myself.

By Mr. O'Neill:

258

Q. Did other men do it at times, too? A. Well, sometimes the helper would come in when they fell down.

Q. Did you tell anybody about this brattice and the holes in it and the boards coming out, and the brattice not coming up to and into your crosscut?

Objected to as immaterial, irrelevant and incompetent and as not having anything to do with the case.

The Court: I will divide the question first. I will let the witness say whether he ever had any conversation with anybody about the cap or boards falling off the brattice.

Mr. Thomsen: If your Honor please, I merely want to suggest that it is testified that he fixed those himself, and why he should tell anybody else I can't understand as competent evidence.

259

The Court: He may answer. Objection overruled. He may say whether he talked with anybody before the day of the accident.

Defendant excepts.

A. I spoke to Jack Davis and Bill Powell; both of them. And he said, "I will send up the company man to fix it up." But he didn't send him until I was hurt.

260

Mr. Thomsen: In response to a question he is giving the entire conversation to the jury. I move to strike it out.

Motion denied.

Mr. Thomsen: I move to strike it out as not responsive.

Motion denied.

The Court: That question and the two preceding ones made his answer responsive.

Defendant excepts.

Q. Did you also tell them about the brattice not being long enough and not coming up to the edge of the crosscut and into the crosscut?

261

Objected to as leading.

The Court: He may say with reference to the brattice whether he had any talk with either Davis or Powell.

Defendant excepts.

A. Yes.

Q. Before the day of the accident? A. Before I got hurt.

262 Q. What did you tell him? A. I told him that morning, I said, "It is too far from my brattice to the face. I have got no air." And he said, "Never mind; go, go to work. Everything is all right." He said he would send a company man to put it up. That was what he told me that morning.

Q. But he didn't do it up to the hour that you were hurt? A. No.

Q. How many holes did you drive there that morning? A. Four holes I fired.

Q. Were there 4 holes that you fired in the morning? A. Before noon; 4 holes I fired.

263 Q. And the 5th hole? A. That was in the afternoon, and that was the one that I got hurt on, the one that I was going to shoot in the afternoon.

Q. How deep were these holes that you blasted in the morning, and this 5th hole that you were going to blast? A. Well, some holes were drilled 4 feet and some 5 feet deep; but this one was 5½; I drilled deeper.

Q. Was it being driven on a sort of a slant so that when the coal comes up it goes up against the opposite wall? A. Yes.

264 Q. You had in there at that time your safety lamp at your belt and also this open lamp, did you? A. Yes, sir.

Q. And you were no longer using batteries because the boss had told you to use squibs; is that correct? A. Yes.

Q. And you were no longer using a closed lamp because the boss had taken that away and told you to use the open lamp; is that correct? A. Yes.

Q. Is this what is known as a squib (handing squib to witness) A. Yes, that is a squib. The touch paper lights that.

The squib is marked Exhibit 7.

Q. After you drilled the hole you put black powder in it, did you? A. Yes. 265

Q. What did you put in the hole after drilling it? A. Powder.

Q. How much powder? A. In some holes 15 inches and in some holes 20 inches.

Q. Is the powder in a sort of a paper tube? A. Well, the powder is in the paper, and they send it from the company shed in the kegs; they make up that powder.

Q. And it is kept out in some other place, is it? A. Yes.

Q. After you put the powder in the hole what next did you do? A. Then I put a needle in it, what they call a needle, and push in the powder; after, I take the needle out and I fill dirt in that hole and I push it in; tamp it. 266

Q. You put the needle in? A. Yes.

Q. And after you have got the dirt tamped in what do you do with the needle? A. When the hole is tamped I pull out the needle, and afterwards put in that hole the squibs.

Q. And you take those squibs and stick them in the hole which is left by the removal of the needle? A. Yes.

Q. Then you have a hole in the tamping going direct to the powder; is that correct? A. Yes; from the squibs it would go to the powder. 267

Q. While you are doing that where do you leave your open lamp? A. Well, I leave it up about 3 or 4 steps away from the hole.

Q. And leave it on the ground? A. Yes.

Q. Then what do you do in order to light the squib? A. Well, I take the touch paper—

Q. Is this like touch paper (handing paper to witness)? A. Yes.

Q. Do you roll it up like that (illustrating)? A. Yes; first tight, so that it don't burn too quick.

268

It is stated that the piece just shown the witness is like the one put in evidence.

Q. Feel that, and see if that is the touch paper like what you used? A. Yes, that is the touch paper (feeling it). You take 3 pieces together, and twist them tight, so that it won't burn too quick, and then put it to the light and light the squibs.

Three pieces of the paper are marked Exhibit 8.

269

Q. When you light the touch paper on your open lamp it doesn't make any flame, but just burns slowly; is that correct? A. Yes.

Q. Then you let your open lamp remain over there on the ground, and then you go to the squib and light it; is that correct? A. Yes.

It is agreed that for the purpose of examining the witness and illustrating other squibs and touch paper, Exhibit 8 may be used, preserving the exhibit for the record of the case.

Q. How long do these squibs light before they go off? A. Sometimes it takes 2 minutes and sometimes 3 minutes.

270

Q. Down in the mine they are more or less damp, are they? A. Yes, they are damp.

Q. And you have plenty of time to get out of your crosscut and into your working place and into another crosscut, if it takes that time? A. Oh, yes; you have enough time to go to another crosscut.

Q. This day, when you were trying to light the squib with the touch paper did you light it the first time? A. No.

Q. What happened? A. On the third time—I don't know whether it was two times that it went out, and the third time I went to the lamp and

lighted it, and the third time I lighted the squibs.

271

Q. How far was your open lamp away from the squib when you lit the squib? A. I can't tell exactly; about—I count it 3 or 4 steps.

Q. Before you started to light the touch paper on your open lamp what did you do with your safety lamp? A. Well, I looked to see if there was no gas.

Q. You took your safety lamp from your belt and held it up along the face? A. Yes.

Q. And you observed no gas? A. Yes; there was no gas at that time.

Q. How does your safety lamp show there is gas? A. A blue light; in the middle of the seat a blue light would show, when there is gas.

272

Q. When you finally did succeed in lighting this end of the squib which takes about a couple of minutes to burn, what did you start to do then? A. I lighted the squib.

Q. After you lit the squib and you were all through, what did you start to do? A. I started to walk out, and walked to the open lamp, and went to put it on my head, and it lit up the gas and knocked me down; afterwards I thought it had gone out; I started to get up, and when I began to raise myself the gas knocked me down again on the side. At that time I was facing the blast; and the second time I fell down the blast came.

273

Q. Were you knocked down by the gas once, or twice before the blast came? A. Twice.

Q. Before the blast came you were on your back with your face up? A. Yes; the second time when I fell down on this side my face was right towards the shot.

Q. Is there also another way of setting off black powder, by what is known as a fuse? A. Yes; this is the fuse (indicating).

274 Q. Can't that fuse be used on powder too? A. No, I don't use it with powder.

Q. Can a fuse be lit only at the end after it is slit, or can it be lit in the center? A. It is lighted at the end.

Q. But on account of its covering it don't light at the center, or any other part? A. No; it must be cut off.

Q. Whereas, if a squib is lit by gas it can be lit any place of this paper that remains beyond the powder; is that correct? A. I don't understand that.

The question is read to the witness.

275

A. It can.

Q. Did you light this particular squib on the end? A. Yes.

Q. And if it was not for the gas lighting and knocking you down you would have gotten out of this crosscut in safety, wouldn't you? A. Oh, yes; I had plenty of time to get out; there was lots of time, after I had lighted, to get out.

Q. And this burn on the top of the head that the doctor testified to, is that a burn that you got at the time of the accident? A. Yes.

276

Q. After you were lying on the ground and trying to get up and then when the shot went off, after that what was the next thing that happened to you? Don't you remember anything, or were you taken to the hospital? A. From that time I don't remember nothing; I was very much injured.

Q. What hospital were you taken to? A. I forget the hospital; it was in Scranton; the Moses Taylor Hospital.

Q. How long did you remain in the hospital in Scranton? A. 10 months.

Q. You lost your sight right away, did you? A.

Yes; I lay in a bed with nothing to do; they didn't think I would live.

277

Q. Do you mean to say they didn't think you were going to live? A. That is what I mean.

Q. But at all events, from this injury you lost the sight of your eyes, and you have got the other injuries here which have been described; is that right? A. Yes.

Q. Did you suffer pain in the hospital? A. Yes.

Q. Afterwards did you come to the State of New York? A. When I could move I came here, for I thought I might make a better living.

Q. You came here with your wife and children? A. Yes.

278

Q. Do you intend to make New York your home?

A. I live here in New York, but my wife didn't feel very good, and she went back to Pennsylvania.

Q. Did you go back there on one occasion to look after your witnesses? A. Yes.

Q. You live in New York and you are a licensed pedlar? A. Yes, I live here as a pedlar.

Q. How many times did you come over here to New York and live here for a while and go back, after you brought this suit? A. Three times; once before, alone, and I came to New York to see if I could make a better living, and afterwards I came back and stayed 3 weeks, and the next time I came I took my wife to New York.

279

Q. You have a better chance to make a living here in New York than in Luzerne, where there are so many mining cripples? A. Yes; there are so many cripples down there that can't make a living.

Q. In the hospital did you suffer much pain? A. Oh, yes.

Q. How do you get along now? How do you walk or get about? A. Well, there is a man leading me; I keep him day and night.

280 Q. This man stays with you day and night? A. Yes.

Q. To help you? A. Yes.

By the Court:

Q. Do you always use those crutches? A. Yes, I always use crutches.

By Mr. O'Neill:

Q. Are you able to put all your clothes on alone, or do you have to have the man help you? A. No, I have to have help.

Recess till two P. M.

281

Cross examined by Mr. Thomsen:

Q. I am the attorney for the defendant. You hear my voice? A. Yes.

Q. I am going to ask you some questions. I am the attorney for the Railroad Company. A. Yes.

Q. Where were you born? A. I am a Lithuanian, under the flag of Russia.

Q. When did you come to the United States? A. Well, I can't remember the year; but I am here in this country about 30 years.

282 Q. When you landed here in this country what port did you come in at? A. The New York port.

Q. Where did you go, from New York? A. I went to Berlin down from this City, but I can't remember the State.

Q. How long after you arrived in New York from Russia was it before you arrived at this coal mining region in Pennsylvania? A. It was in the third year.

Q. Three years after you came to New York you arrived at the coal mining region in Pennsylvania? A. Yes.

Q. What did you do during those 3 years? A. 283
I worked on the farm.

Q. After you quit farm work what did you do?
A. I went to the mines.

Q. How long after you arrived at the mines did
you go to work in the mines? A. I got a job on the
first day, to load cars.

Q. Was that work in the mine? A. Yes.

Q. Have you worked at mining ever since? A.
Since now, until I got injured.

Q. From that time till you were injured you
worked at mining? A. All that time.

Q. How many years were you actually a coal
miner? A. I was a miner over 20 years. 284

Q. Did you take out a certificate as a coal miner?
A. Yes, I did.

Q. About how long ago was that? A. Since the
Company made the rule that the miners should
have papers.

Q. How long ago was that? A. I can't remem-
ber.

Q. About how long? A. About 23 or 24 years;
it may be more or less; I don't remember well.

Q. Then you have been what they call a certified
miner for about 20 years? A. Yes.

Q. Did you take out what is called a second cer-
tificate? A. Yes.

Q. About how long ago was it that you got your
second certificate? A. I think it was the fifth year,
fifth or sixth year.

Q. About five or six years ago? A. About five
or six.

Q. Did you leave the coal mine region after the
accident, after you came out of the hospital? A.
When I came from the hospital and got a little bet-
ter afterwards I came to New York looking for a
better position.

Q. Have you been in New York ever since, ex-

286 cepting some trips back to the mining region? A. About a week's time.

Q. Do you call New York your home at present?
A. Yes.

Q. Has it been your home ever since you first came here after the accident? A. I call New York my home.

Q. (repeated): Has it been your home ever since you first came here after the accident? A. I count my regular home in New York since I came the second time with my family.

Q. Was the coal mine in which you worked sometimes shut down? A. It was shut down about one
287 year one time.

Q. Did you work continuously in the mine where you were hurt? A. I worked in the mine 18 years, in the Pettibone Mine.

Q. But during that period of 18 years all work would be stopped in the mine for a short period?
A. Sometimes they stopped it for a short while.

Q. But while they were stopped you didn't go to work in any other mine, did you? A. I would work in the same company, in the next colliery for the same company.

Q. For how many years or for how long a time prior to the accident had you worked in the Pettibone mine continuously? A. From the last stopping till that time when I was injured, about seven
288 or eight months.

Q. You have spoken of the amount of your weekly earnings. You have told your lawyer something in relation to that. For how many years prior to the accident have you earned from \$900 to \$1,000 a year? A. When I worked every day I made in two weeks about \$70 or \$80.

Q. I didn't ask you that. You have testified that the sum of your annual earnings was about \$900 to \$1,000 a year, in the 12 months. Now I ask

you how many years prior to the accident did your annual earnings average about \$900 or \$1,000? A. I don't figure; I don't put on any paper how much I make. 289

By the Court:

Q. For how long had you been getting the same wages; for how many years had you been getting the same wages? A. I would make \$800 or \$900 or over \$900 yearly.

Q. (repeated): For how long had you been getting the same wages; for how many years had you been getting the same wages? A. Since I started to work on the mine if I worked full time I made that money; if the mine stopped I couldn't make so much. 290

By Mr. O'Neill:

Q. Did you get the same rate per ton, all the time? A. When I didn't work, the company didn't pay.

By Mr. Thomsen:

Q. How old were you when you came to the United States? A. 18 years old.

Q. When you took out your certificate as a miner did you tell your age at that time to the Board of Examiners? A. No, I didn't say. 291

Q. On the morning of the day of the accident what time did you go to work? A. At half-past six.

Q. Did you enter the Pettibone mine by a shaft or a slope? A. By a shaft.

Q. How far from the mouth of the shaft was the place where you got your lamp? A. What kind of lamps?

Q. A safety lamp, the lamps that you had handed to you? A. About 30 feet out from the foot of

292 that shanty, where I got that lamp; but I can't tell you exactly.

By the Court:

Q. Do you mean after you went down the shaft 30 feet away? A. No.

Q. Up on the ground? A. Up on the top.

Q. 30 feet from the top of the shaft? A. Yes.

Q. Did you have your cap lamp? A. Yes.

Q. Did you bring that from home? A. Yes, I had that at home.

Q. You wore your cap and the lamp on your cap when you went to work? A. Yes.

293 By Mr. O'Neill:

Q. This safety lamp, Exhibit 6, is not used for lighting when you are working, but merely for testing. Is that correct? A. Only for testing.

By the Court:

Q. What about that kind of lamp that had a glass chimney; what did you use that for? A. For work.

Q. Was there any other light down in the mine except your cap lamp? A. There are electric lamps in the shaft, but not in the places where we worked.

294 Q. This day you had nothing but a cap lamp and the safety lamp? A. I had only two, the cap lamp and the safety lamp.

By Mr. Thomsen:

Q. How far was the place where you called out your number 38; how far was that from the mouth of the shaft? A. From that place where you call the number or from the place where you go to the mine? There are two places.

Q. You have testified that you called at some place before you entered the mine, to find out whether it was safe for you to go to work. Now

how far was that place from the entrance to the shaft? A. About 50 or more feet, but I am not exact.

295

Q. Was that a house? A. Yes, sir, a shanty.

Q. What you call a shanty? A. An office.

Q. How tall was the office, was it a one-story building? A. One floor.

Q. And how big was it across the front? A. I can't tell exactly; maybe 10, less or more, feet.

Q. Did you go in that house that morning? A. I never was inside, only by the window to tell my number.

Q. On the morning of the accident when you went to the window and told your number whom did you see in the shanty? A. Bill Powell and Jack Davis and some more people; I don't know who else, but I saw Powell and Jack Davis.

296

Q. When you called out your number, 38, who told you; who responded; who answered you? A. Jack Davis.

Q. He told you it was all right, didn't he? A. Yes, he told me all right, to go to work; but after I asked him for the brattice he said never mind—

Q. That is all. Your talk there was with Jack Davis? A. Yes, Jack Davis told me all right, to go to work.

Q. Did you have any conversation at that time with anybody else? A. Jack Davis and Bill Powell told me never mind, to go to work; they said, "All right, go to work; don't stay by the window."

297

Q. Just answer the question. Did you have any conversation with anybody but Jack Davis at that time? A. Yes, I talked with more.

Q. At that time, that morning? A. Yes, I told Jack Davis when I went away from the window, and I spoke with the miners.

Q. Where were the miners? A. A little further from the office.

298 Q. Standing around outside the office; is that right? A. Yes.

Q. Did you, after this conversation go down into the mine to work, right away? A. Yes.

Q. What did you take with you? A. The safety lamp.

Q. What else? A. I had an open lamp on my hat.

Q. Did you have anything else with you? A. I don't remember.

Q. Just the two lamps is all you remember? A. Yes.

299 Q. You kept your squibs and powder down in the mine? A. I had the squib box always in my pocket.

Q. In which pocket? A. In my side pocket.

Q. Did you have them in your side pocket in your clothes? A. Yes, in my pants, in my side pocket, the squib box I kept in that pocket.

Q. That pocket was in your trousers, near your knee? A. Right by this place (indicating).

Q. Of your mining trousers? A. Yes.

Q. Where was the powder? A. The powder was in the mine.

Q. Down in the mine? A. The powder was outside before; that day I took the powder in.

300 Q. Where did you keep your powder? A. In a box.

Q. Whereabouts did you keep your box? A. In the fourth gangway; from the face the third and from the gangway the fourth.

Q. How old were you when you got married? A. Forty-six.

Q. Had you ever been married before that? A. No.

Q. Where were you, if you know, when you first had your senses; when you recovered your senses after the accident? A. In the hospital.

Q. Who went with you to the hospital? A. 301
My wife was there when I found myself again.

Q. I mean from the mine; who went with you
from the mine to the hospital? A. I don't know.

Q. Are you acquainted with a man named An-
thony Postkange? A. Yes, I know him.

Q. How long have you known him? A. Ten or
twelve years.

Q. Do you know a man by the name of August
Kregel? A. Yes, I know that boy, the man.

Q. How long have you known him? A. I can't
tell, I am surè, but about ten years or nine; I
can't tell exactly.

Q. Are you acquainted with a man named Mike 302
McAlonoif? A. Yes.

Q. How long have you known him? A. Well,
the same way; about nine or ten years.

Q. Did Mike come down here to New York
within the last few months or few weeks? A.
About two weeks he was here; but I didn't speak
with him long.

Redirect examination by Mr. O'Neill:

Q. That day you say when you lit this squib
the touch paper went out on you twice before
you touched the squib at all; is that correct? A.
Yes. 303

Q. And this time that you did light it was the
first and only time that you did light it. Is that
right? A. The first time.

JOHN ZAMANSKI, being duly sworn, and ex-
amined as a witness for the plaintiff, testified with
the aid of the interpreter.

By Mr. O'Neill:

Q. Were you working down in this Pettibone

304 Mine on the day that Matt Yurkonis was hurt?
A. Yes, sir.

Q. For how long a time had you been working down in this Pettibone Mine? A. I had been working about nine or eight months; I couldn't remember exactly.

Q. Do you remember these six cross cuts which led from this working place? A. Yes.

Q. When you came there were any of these cross cuts cut through? A. Yes.

Q. Were you there when the first cross cut was cut through? A. No, I wasn't there when the first cross cut was cut through.

305 Q. You came there when they were cutting what cross cut? A. The fifth.

Q. And the first, second and third cross cuts, when they were driven through, did you see them driving them or were they finished before you got there? A. They were finished before I got there.

Q. How were the first, second and third cross cuts closed? A. They had been welded up with stone and with cement.

Q. And the partitions in the first, second and third cross cuts were made by stone and cement in the center of the cross cut? A. Yes.

306 Q. Now, taking the fourth cross cut, what was in the fourth cross cut? A. Boards.

Q. And no building material and cement? A. No, sir.

Q. And the fifth cross cut; what was in that? A. Nothing.

Q. And the sixth cross cut, was that being driven from both sides or was Yurkonis driving it alone from one side? A. I believe he was only driving from one side, as far as I could see.

Q. Where did you keep your materials? A. In the fourth cross cut.

Q. And you worked right around there in the neighborhood of these cross cuts? A. Yes, sir, I worked up above the cross cut.

307

Q. Above the fifth cross cut? A. Above the fourth cross cut.

Q. You worked between the fourth and fifth cross cuts? A. Yes.

Q. Do you understand me? A. Yes, sir.

Q. On account of keeping your materials and things in the fourth cross cuts you saw the boards there; is that right? A. Yes, sir.

Q. Now, tell the jury how these boards were in the fourth cross cut? Tell us whether they were solid or tight, or whether there were holes or whether they were loose or how they were, for a period of two months previous to the accident? A. A few boards, about two boards had been loose, top boards from the roof, they had two props in the cross cut.

308

Q. How did the boards come loose and how did they hang? A. They were loose from the prop, two or three, because there was no cap piece on the prop; it was loose.

Q. We will suppose this doorway represents the cross cut. Come over here and tell us just how this partition was built and where the holes were and where the boards fell down. A. We could take this door for the brattice and they would put up one prop about—I couldn't tell exactly, but about a foot from the rib; the props would be about a foot from the rib, and the other one was on the other side about a foot also from the wall of coal; they start and put the boards from the bottom.

309

Q. How wide were the boards? A. Well, I couldn't tell exactly; about six inches or so.

Q. Then they would build up a 6 inch board one on top of the other, and the boards stretched

310 across? A. Stretched across to the ribs; then they got one prop tight up to the roof, and one got loose; one was stuck tight and the other one got loose when the brattice was leaking; there were two props there, by the one rib.

Q. How did they make it tight before it got loose; what kind of a piece would they put in? Do you know what a cap piece is? A. Yes; they put a cap on that; sometimes they put a cap on that, and sometimes they didn't; they sometimes would pick a little hole in the roof.

Q. But they had a cap piece, and the cap piece came out? A. Yes.

311 Q. And when it came out with the blasting going on tell us about the boards and cracks and so on? A. As far as I can remember there were two boards up on top that was loose; that is from that one post, from the one prop; and that prop wasn't tight up to the roof.

Q. Did they hang over? A. They hung over (indicating) the boards were swung out.

Q. Also you say there was a foot space between the post and the ribs. What was there and what was the hole and what did they do with the hole? Were there any holes on the sides which they used to fill up? A. On the one side, from the top.

312 Q. What did they do with those holes on the side? A. I seen Yurkonis fixing them sometimes.

Q. Did you see people putting rags and canvas into those holes? A. I saw my workman putting it in once, putting canvas into the holes.

Q. Did this make the brattice leak, these holes and these boards being out? A. Yes, on one corner.

Q. And when the brattice would leak would that let the good air go through the fourth crosscut and lose itself back in the gangway? A. It couldn't be, because the leak goed down—

Q. Which way would the good air leak on account of the brattice being bad? A. It didn't go into the sixth crosscut.

313

Q. That is what I mean; instead of the air being driven through into the sixth crosscut it would leak back to the gangway; is that what you mean? A. Yes, sir.

Q. Let me also make this clear to the jury. The current of fresh air when it first came in, did it go through Yurkonis's working place or did it go through the opposite working place? A. I don't understand that.

Q. Here is the gangway and here is the place I have marked Yurkonis's working place, and here is another working place (illustrating); they drive from both sides. Did the air come along here in the opposite working place and then go through there where there was the break and continue on through the fifth and then have to go around the corner into Yurkonis's working place? A. The air would go into Yurkonis's working place.

314

Q. But did it go directly—or did it have to go through the fifth crosscut first? A. Yes, sir.

Q. Which is it; did it have to go through the fifth crosscut first? A. It went through the fifth crosscut first.

Q. In other words, the air went along the opposite crosscut or opposite working place and it then went through the fifth crosscut and then out into Yurkonis's working place before it got to his crosscut. Is that correct? A. I don't understand you exactly.

315

The Court: There isn't any dispute about that, is there?

Mr. O'Neill: Not that I know of.

Q. Had you seen gas lighting in this tunnel at this place before the accident? A. Which place?

316 Q. In these different working places and cross-cuts? A. I saw it in the working place once; I haven't seen it in the crosscut; I saw once when the gas was lighted.

Q. And how did they get that out? A. They had some canvases and they put them on the place and they choked it out; it was only a leak from the feeder from the cracks.

Q. Now, the brattice in the working place—did that stop between the fifth and the sixth crosscut, or did it go into the edge of the crosscut? A. That was started from the fifth crosscut and went into Yurkonis's place; but it wasn't in to his crosscut.

317 Q. How far from the edge of the crosscut did it stop out in the working place? A. I couldn't remember; it might be about 12 feet or something like that.

Q. Instead of going up to the edge of the crosscut and going in it, it stopped 12 feet from the edge? A. I couldn't remember; I didn't measure it, but about 12 feet.

Q. You know the brattice should go into the crosscut, don't you? A. Yes, it should go in.

Cross examination by Mr. Oliver:

318 Q. I understand that you worked in the Pettibone colliery of the Delaware, Lackawanna & Western Railroad Company? A. Yes, sir.

Q. How long have you been a miner? A. Oh, I have been a miner about the last 15 years.

Q. How far away were you from the place of Yurkonis's chamber? How far away from the place of Yurkonis's chamber was your working place? A. I couldn't remember; it might be about 100 feet, but I couldn't remember exactly.

Q. That is your best judgment, about 100 feet? A. Yes.

Q. As I remember your testimony you stated that the end of the brattice in Yurkonis's chamber was about 12 feet away from the sixth crosscut, is that right? A. Yes, the brattice was not into the sixth crosscut. From the fifth crosscut there was quite a bit that wasn't into the sixth crosscut. 319

Q. The brattice started at the fifth heading or crosscut, didn't it? A. Yes, sir.

Q. And went up towards the face of Yurkonis's chamber? A. Yes, sir.

Q. You said, did you not, that the end of the brattice was about 12 feet from the sixth heading? Didn't you testify that the end of the brattice was about 12 feet from the sixth crosscut or heading? A. It was back. 320

Q. Is that right? A. Yes, sir.

Q. Where were you when you measured that distance? A. I don't measure it, but I just guess it.

Q. That is a guess on your part? A. About the brattice?

Q. Yes. A. Well, I was in that place some time and I couldn't judge exactly on that that it would be that much.

Q. Then your judgment is that it would be about 12 feet, and that is from working in your working place? A. No, sir, that was Yurkonis's working place. 321

Q. And your judgment is that it was about 12 feet from the end of the brattice over to the sixth heading. That is right, is it? A. There was no brattice in from the sixth crosscut; it was about 10 or 12 feet back.

Q. Where were you standing when you made the guess as to how far it was? A. When I saw the gas?

Q. No, when you looked at it? A. I was up in his place.

By the Court:

Q. Where was this fire? You say you saw the

322 gas on fire; was that in the sixth heading? A. No, that was in his working place.

By Mr. Oliver:

Q. When was it that you made the guess as to how far the brattice was from the sixth heading? A. I don't understand that.

Q. When was it that you guessed that it was 12 feet from the end of the brattice to the sixth heading? When was that?

Objected to.

Objection sustained; exception.

323 A. I was there about three or four days before Yurkonis got hurt.

Q. That was when you saw how far the brattice was from the heading? A. Yes, sir.

Q. I understood you to say that you kept your tool box in the fourth heading? A. Yes, sir.

Q. And every time you wanted any of your tools or your powder or squibs you would have to go to the fourth heading for them? A. Yes, sir.

Q. In other words, you used the fourth heading a great deal during the day's work? A. I didn't use the fourth heading; I had—whenever I needed the powder I would go to the fourth heading.

324 Q. You used to eat your dinner there and go there often during the day? A. Yes, sir.

Q. And did Yurkonis come down there and eat his dinner too? A. Yes.

Q. Was his box in the fourth heading too? A. Yes, it was.

Q. And he would come down to get his powder and squibs, etc., in the fourth heading? A. Yes, sir.

Q. You would do it often in the day? A. When I needed the powder; a couple of times a day.

Q. And Yurkonis would come down a couple of times a day? A. Yes.

By the Foreman:

325

Q. Did you meet Yurkonis every time you went to the fourth heading? A. No, not every time; when he was in his place I never met him; sometimes I did meet him, but not every time.

Q. You don't know about how many times you would meet him? A. No, I went once or twice a day, once or twice or when we had our dinner or sometimes we would meet when I went for a drink or something like that; whenever I met him when he would go for powder or something like that.

Q. What did you have there to drink? A. Coffee; coffee or tea.

By Mr. Oliver:

326

Q. In other words, you would go to your dinner or to get something to drink? A. Yes.

Q. There was a bottle in your dinner can? A. Yes.

Q. And you and Yurkonis would eat your meals together? A. Sometimes; not always. When we had time at the same time we would eat together.

Q. Sometimes you would eat your dinner together in the fourth heading? A. Sometimes.

Q. Would that be about every other day? A. I couldn't remember that exactly.

Q. You couldn't give me some idea? A. Sometimes we met every third day or every other day.

327

Q. But two or three times a week you would eat dinner in that fourth crosscut together? A. Yes.

STANIZI KORIKONIS, being duly sworn and examined as a witness for the plaintiff, testifies through the interpreter:

By Mr. O'Neill:

Q. Were you working down in this mine when Yurkonis was hurt there? A. Yes, sir.

328 Q. How long were you working there? A. Four years and a half.

Q. Were you a helper there? A. Yes, I was a helper there.

Q. The first, second and third cross cuts, did Yurkonis drive them from his side with batteries and dynamite? A. As far as I know the second cross cut they worked with dynamite and batteries.

Q. After the first, second and third cross cuts were finished how were they closed up? A. With cement and rocks.

Q. When the fourth cross cut was finished what did they close that up with? A. With boards.

329 Q. When they made the fifth cross cut and were finished with what was there in the fifth cross cut? A. Nothing.

Q. The air went through the fifth cross cut and then into Yurkonis' place so that it could go into the cross cut; is that right? A. Yes.

Q. Tell the jury what was the condition of the boards in the fourth cross cut during all that time, as to whether they were firm or whether they got loose or whether any part of it fell down or whether there were any holes in it, or what? A. One post; the left post was loose; they were loose all the boards and bent out on one side.

330 Q. Bent out from one side? A. Yes, sir.

Q. Was there a big hole and if so what was the size of the whole? A. So big a hole that you could put your whole hand in all around.

Q. Were there other holes on the side of the rib? A. When stone was taken out there was holes on the side of it.

Q. When the blasting would come after it was built up would more coal fall out of the side? A. The coal would fall out.

Q. Did that make holes on the sides? A. Such holes as a hand could go in.

Q. Did you try, yourself, to fill up these holes? 331
A. I tried to fix it with rags.

Q. And after it was fixed with rags and trying to put these boards back did it fall out again at different times? A. They would fall off, but not so very thick.

Q. You would fix them up from time to time?
A. If the miners said to me to help I would go; and if a miner didn't send me I wouldn't go.

Q. With reference to the brattice and Yurkonis' working place, did the brattice go from the fifth to the sixth cross cut all the way, or only part of the way to the sixth cross cut? A. There was about 10 feet from the corner brattice that it didn't go; 332
it didn't reach the corner by 10 feet.

Q. And of course there was no brattice at all inside the cross cut? A. No, there never was.

Cross examination by Mr. Oliver:

Q. You were a miner's laborer in the Pettibone mine, were you? A. Do you mean at that time or now?

Q. At the time of the accident? A. I was a helper.

Q. A miner's helper; is that what you said? A. A miner's helper.

Q. Who was your miner? A. That man who was sitting before on the chair. 333

Q. You were the laborer then for John Zaman-ski? A. Yes.

Q. Did you sometimes eat your lunch in the fourth heading from Yurkonis' place or chamber, the fourth cross cut from the gangway in Yurkonis' place? A. Yes.

Q. Your miner kept his box in there? A. Yes.

Q. When he would want powder or squibs or tools would he sometimes send you into the fourth heading to get them? A. He would go himself.

334 Q. Did he ever send you into the fourth cross cut or heading for anything? A. He would send me for spikes.

Q. Did you ever see Yurkonis in the fourth heading or cross cut from the gangway? A. Yes.

Q. Did he sometimes eat his dinner in there at the same time you were eating dinner at the same place? A. Yes, sir.

Q. How often would he do that? A. We would eat twice a day.

Q. How often would Yurkonis eat his meals with you in that fourth cross cut? How many times a week? A. Every day.

335 Q. How far from the rib in Yurkonis' chamber was the box into the fourth heading, your miner's box? A. It was over 100 feet—

Q. You don't understand my question. Do you know what the rib of Yurkonis' working place of chamber means? A. About 10 feet from the edge.

Q. About 10 feet from the rib? A. About 10 feet from the rib.

Q. Did you measure how far it was from the end of the brattice to the corner of the sixth heading? A. I didn't measure, but I figured this; they are standing two car lengths about so long is two car lengths (illustrating).

336

Plaintiff Rests.

Mr. Thomsen: Defendant moves that the plaintiff's complaint be dismissed and that the Court direct a verdict for the defendant on the following grounds:

First. That the plaintiff has failed to show any negligence for which the defendant is liable as a matter of law.

Second. That the evidence shows conclu-

sively that the plaintiff's injuries were 337
caused wholly by his own negligence.

Third. That the plaintiff must be held as a matter of fact and of law, under the evidence, to have assumed the risks of being injured in the way and manner in which he was injured.

Fourth. That the sole proximate cause of the plaintiff's injuries was his own negligent acts in doing his work.

Fifth. That the evidence shows conclusively that the mine structure, ways, works and facilities, whatever their condition may have been at the time of the accident, are 338
not relevant or material to this case.

Sixth. That the evidence shows conclusively that there was no explosion of accumulated gas in the chamber or working place where the plaintiff was working at the time of the accident.

Seventh. That the evidence shows conclusively that plaintiff's injuries were not caused by anything directly or indirectly related to the ventilation of the mine.

Eighth. That the defendant owed no duty to the plaintiff to furnish plaintiff with anything except a properly ventilated place to work in. 339

Ninth. That the evidence shows conclusively that the defendant violated no legal duty towards the plaintiff.

Tenth. That the evidence shows conclusively that plaintiff's injuries were caused by an explosion of powder which he shot

340

off himself, and that plaintiff was an expert miner of long experience in handling explosives and in firing them off.

Ruling Reserved.

Testimony for the Defendant.

HENRY G. DAVIS, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. Oliver:

I live in Kingston, Pennsylvania.

341

Q. What is your business? A. Superintendent of coal mines for the Delaware, Lackawanna & Western Railroad Company.

Q. Will you state for the benefit of the Court and jury just what your experience has been in coal mine business? A. I have been employed around the coal mines for a little over 40 years. I started in the mine as a door boy and have worked at that occupation from the lowest up to my present position; I have been acting in an official capacity for the company for the past 20 years; that is, an assistant foreman to the Superintendent.

Q. Have you ever been foreman of an anthracite mine in Pennsylvania? A. Yes.

342

Q. For how long? A. I have been foreman at four different collieries; my first position as foreman was at the Diamond Colliery of the Delaware, Lackawanna & Western at Scranton for a period of three years, from 1893 to 1896; I then took charge of Storr's Colliery for about three months; that is located in the Borough of Dixon north of the City of Scranton; afterwards I took charge of the Woodward Colliery located in Kingston for a period of about three or four months and again I had charge of Cayugle Colliery located in North

Scranton for seven years. I have since been superintendent.

343

Q. As superintendent have you supervision for the Railroad Company over the Pettibone Colliery where this accident occurred? A. Yes, sir.

Q. For how long have you had superintendence over that colliery? A. Since January, 1903.

Q. Are you acquainted with the conditions surrounding the mining of coal in that colliery and in other collieries in the vicinity? A. I am.

Q. Are you acquainted with the working place at or in which the plaintiff Yurkonis was injured? A. I am, yes, sir.

Q. For the benefit of the Court and jury I wish you would as briefly as possible and yet make it thorough, explain the system of ventilation in the Pettibone Colliery; that is, the method of ventilating?

344

Mr. O'Neill: Which shaft?

A. There is but one system of ventilation in both shafts; the second shaft is but a second opening to the main shaft.

Q. I will ask you to take the air into the mine and bring it out again, with reference to this part of it? A. The Pettibone Colliery is ventilated by a 35-foot exhaust ventilating fan driven by a direct connected Corliss valve steam engine. The main shaft, the No. 1 shaft, is what we call a 4-compartment shaft; one compartment is used for pumping, 2 for hoisting and the others for ventilating.

345

Q. You mean by that that the one hole is divided into four parts? A. Yes. The seam or face in which Mr. Yurkonis was employed at the time of the accident is about 500 feet down the shaft.

Q. That is below the surface? A. That is below the surface. The depth of the shaft is 1,047 feet; the distance in this seam which is opened by a land-

346 ing in the shaft to a rock tunnel and which is
driven from the seam through an underlap fault
is approximately about 1,400 feet to where Mr.
Yurkonis was working. The Pettibone Colliery is
located on a narrow strip of land, the main heading
or gangway is driven right in the center of the prop-
erty and the gangways driven for mining or what
we call lead chambers in a narrow property is
driven on the strike of the seam; that means where
you would find a level road. If you were going to
drive across this slide where you would strike a
point at which your road would run level and if
347 you would deviate from that one you would go
either up or down hill; the strike means about the
level part; wherever you would strike about a level
road; this place was driven to the east half of the
main gangway, the place where Yurkonis was
working was driven east off of the main gangway;
and the gangway run north. The place where Yur-
konis was working had been driven at the time of
the accident approximately 400 feet from the main
gangway road, and was then at the boundary line
of the property. Coming back to the shaft again
and taking in the air current, the air current goes
in along the haulage road, that is the road upon
which the coal is hauled out to the shaft from the
working place; that is the main gangway.

348 Q. The air goes into the mine through a gang-
way? A. Yes.

Q. When the air is coming from the working
place to the shaft what is that main road called?
A. The air way; the return is always designated
by the word "air." The air current is taken along
this gangway road and into the place outside of
Yurkonis's place, or where he was working at that
time.

The Court: If you would tell us how the

air was taken out from the main gangway 349
I should like it.

A. I should have stated that the ventilating fan located upon the top of the shaft is unloading this air out of the mine revolving at about 50 revolutions per minute, a 35-foot fan travels a little less than a mile a minute. Every revolution of that fan displaces a certain quantity of air from the top of the shaft, thus reducing the density of the air on the outlet as compared with that on the inlet. This fan unloading on this side creates a partial vacuum thus causing this air current to rush down into the shaft and around the air ways and so on, and finally back to the surface. 350

By the Court:

Q. Does the fan simply drive the air or does it both drive and suck? A. In this case we will call it suck.

Q. It doesn't drive at all? A. No, sir.

Q. The air comes in simply from the open atmosphere? A. Yes.

Q. But the motion of the fan sucks it out so that the vacuum behind is what makes the current of air? A. Yes.

Q. In what kind of pipes or by what means does it get down the shaft and through the gangway; just simply the open space? A. Just the opening that is made by the mining of the coal. 351

Q. The suction of air at the outlet is hauling the air through the gangway? A. Yes.

Q. So you need no pipes A. It is unnecessary.

Q. Now we have got to the main gangway that is 400 feet long and leads to the crossing? A. Yes. At that point the ventilating doors are put to diverge the air current into these places that are driven east of the main gangway road. As has been already explained the crosscuts that are driven

352 between the chambers or headings as we call them, are driven for the sole purpose of ventilating the working places known as chambers or gangways and air ways and so on.

In this particular case, as already testified, there had been driven five headings or crosscuts; the sixth was being driven when Mr. Yurkonis was injured.

By Mr. Oliver:

Q. Explain how that air was conducted from the crosscut to the face of the heading where Yurkonis was injured. A. The air current being diverted as I said before by these doors into the outside place, or the place in which Clarence Fein was working—

353

Q. Do you mean by outside the one farthest from the shaft? A. The nearest to the shaft; the furthest from Yurkonis.

By Mr. O'Neill:

Q. In other words the air didn't go directly through Yurkonis's chamber, but went through the next one? A. The outside place or air went through, first through the crosscut and behind the brattice into Yurkonis's place.

Q. But it went into another working place? A. It first went into Fein's place. We got this air right into Fein's place and get it into the inside heading and as that place advances we have got to carry an air brattice to conduct that ventilating current into the place of the working. The air passing around the end of the brattice goes back through the fifth crosscut behind the brattice into the face of Yurkonis's place and back along his road into the places that are working on the outside of him, and again into the main gangway leading through the inside crosscut of the gangway road to the return airway and then in the return work-

354

ings; and goes through the airway back to this fault and is brought down through an air shaft into the underlap and from there conducted to the up-cast, to the outside.

355

By the Court:

Q. Did the first, second, third, fourth, fifth and sixth cross cuts run between Fein's place and Yurkonis's place? A. Yes, sir.

Q. And after the air went into Fein's gangway and went through the only one of these crossings that was open—that is, the fifth—and then was conducted up under the brattice to near where Yurkonis was working, how did it get into this airway? Was there a tunnel or was there a pipe, or what? A. It went around and followed these working places through the cross cuts and behind the brattice back along the road in which Mr. Yurkonis was working through a couple of places that were working on the outside, turned off of that road at right angles to them.

356

Q. Then, after it had gone through the crossing it turned to the right and went along out along this brattice to the end of the gangway where Yurkonis was making the cross cut? A. Yes.

Q. And then it went simply as the air would go out under the end of the brattice and would fill Yurkonis's gangway? A. Yes.

357

Q. And the suction would be back towards the main gangway? A. Yes, sir, the main airway. One is called a gangway and the other is called an airway.

By Mr. Oliver:

Q. Isn't a brattice a partition that the air goes up in one direction on one side and down in the other direction on the other side? A. Yes.

Q. In other words it turns around at the end of the brattice? A. Yes.

358 Q. It comes out from under this partition and that lets it out into the gangway? A. Yes.

Q. One of the witnesses said that in some places the brattice was placed diagonally against the wall, but— A. This particular one the brattice went straight up, just like behind this counter (indicating).

By Mr. Oliver:

Q. Can you draw a diagram showing Fein's place and Yurkonis's place and the brattice, showing the way the air is conducted? A. It will take a little time.

359 The Court: He can bring that tomorrow. Mr. Davis may make just a sketch of this working over the current past Fein's and Yurkonis's working place and the cross-ings and the location.

Q. It has been testified that the fourth heading from the gangway was built of boards. Can you tell or do you know whether or not that construction was temporary or permanent? A. Temporary.

By Mr. O'Neill:

360 Q. First tell whether it was boards? A. It was boards.

By Mr. Oliver:

Q. Boards I am assuming. Will you kindly explain the necessities of the ventilation system which required that it be temporary?

Objected to as calling for a conclusion, as to the necessities.

The Court: He may state the circumstances under which it was made of boards

instead of stone, and then we will see its condition. 361

Exception.

Objected to as calling for a legal conclusion.

The Court: I don't think there is any defect here charged in this large suction plant or in the air current, so far; so that I think you will have to bring it down to whose duty it was to inspect that kind of a mine.

Mr. Oliver: I think I have a right to bring in the ventilating system which would include the ventilating system in the place where Yurkonis worked, as well.

The Court: It doesn't make any difference. You may ask him the question. 362

Exception.

A. The anthracite mine man—

Objected to.

The Court: Answer the question.

The question is read to the witness.

Objected to as calling for a legal conclusion, and this witness bases his answer upon his opinion of the law.

A. Good mining demands that the second last cross cut from the face shall never be closed permanently. A fall of the roof on the inside blocking the air current would result in filling a gaseous mine with gas, necessitating the removal of a permanent stopping which would be rather a dangerous thing to do, under a gaseous condition. Then again in mines generating explosive gas, mine fires sometimes occur which, before the official in charge of the mine arrives at the point where the trouble exists, the fire has gained such headway that we cannot reach the fire from the 363

364 inside cross cut or heading. It must be reached from the second inside one. Hence as soon as the first cross cut is completed the next one is always closed permanently; never before. It is simply a question of putting up some temporary arrangement to divert that current into the face and then it need not be closed entirely.

By the Court:

Q. You mean you always keep the last cross cut open and the next to the last, so that it can be opened nearly, and then back of that you close up permanently? A. Yes, sir.

365 By Mr. Oliver:

Q. Are you acquainted with the methods of ventilation and the arrangement of cross cuts and the method of ceiling them in the anthracite mines in the Schuylkill and Lackawanna Valleys in Pennsylvania? A. I am, yes, sir.

Q. Whether or not the system which you have just described is the usual and ordinary system employed in the collieries in the anthracite fields of which I have spoken? A. Yes.

366 Q. In whose charge, if at all, was the ventilating system at the Pettibone Mine upon the sixth of July, 1911, which was the day of the injury to Mr. Yurkonis?

The Court: You may give the man's name that had the mine, who in the ordinary course of his duties looked after the ventilating part of the operation.

Exception.

A. William F. Powell.

Q. Whether or not on the sixth of July, 1911, the Pettibone Colliery where Mr. Yurkonis was injured was or was not in charge of a certified mine foreman?

Objected to as calling for a conclusion
as to whether it was in his charge. 367

The Court: He may say whether there
was any one there on duty.

Exception.

A. Yes, sir.

Q. What was his name? A. William F. Powell,
he was the mine foreman.

Q. Was this Bill Powell? A. Yes, this was
Bill Powell.

By Mr. O'Neill:

Q. Is Jack Davis a relation of yours? A. No.

By the Court:

368

Q. You are not Jack Davis. You know the
man that Mr. O'Neill means, by the name of Jack
Davis? A. Yes, sir.

By Mr. Oliver:

Q. As superintendent for the D., L. & W. dis-
trict which includes the Pettibone Mine, whether
or not it is your duty, under the company, to see
that the various collieries are placed in charge of
a mine foreman?

Objected to as calling for a conclusion.

The Court: He may state whether he
has a mine foreman under him who was
there at the mine; unless it is shown that
he actually wasn't there that day we can
assume that he was performing his duty.
It doesn't make any difference whether the
company violated all the laws of Pennsyl-
vania outside of this one particular law.
He may testify whether at that particular
mine he had a man who, if he was doing
his work, was doing certain things on that
day. 369

370

Mr. Oliver: Mr. Davis, as superintendent—

Objected to.

The Court: If Mr. Davis is Superintendent he has somebody there at the mine doing certain things; and just what he may have been doing at the time is another matter.

Mr. Oliver: I should like to frame my question. I only wish to ask whether he did, as Superintendent, place the man in charge of a certain place.

371

The Court: He cannot answer that. He must say whether he had some one there who was doing the work of what you call a mine foreman.

Defendant excepts.

By the Court:

Q. Was your own office at that time at that mine? A. No, sir.

Q. You weren't there personally that day? A. No, sir.

By Mr. Oliver:

Q. Over how many collieries have you superintendence? A. Seven.

372

Q. In whose charge was the Pettibone Colliery upon the sixth of July, 1911, the day of the alleged accident to Mr. Yurkonis?

Objected to as calling for a legal conclusion.

The Court: Objection sustained to the word "charge," but he may say who was the officer that on that day was directing this particular colliery.

Exception.

A. Mr. W. F. Powell.

373

The Court: In the sense that you mean whether he was the man that was there to do the work I will let him answer the question. As to whether he was actually in charge depends on the facts.

Q. Was there any one at the Pettibone Colliery on the day of the injury to Yurkonis who was superior to him or who was expected to give orders to Mr. Powell in the conduct of that mine?

A. I don't think so.

Mr. O'Neill: I move to strike out the answer.

374

By the Court:

Q. You mean there wasn't anybody that you know of? A. Not anybody that I know of.

Q. Is Mr. Powell in Court? A. Yes, sir.

By Mr. Oliver:

Q. Do you know Mr. John Davis? A. Yes, sir.

Q. Whether or not at any time canvas was used for the construction of brattices? A. Yes, sir; as matter of fact you can't use anything else when you are blasting coal off the solid but canvas within a considerable distance of the face, as it means destruction to boards or planks or anything else that might be used.

375

Q. Why? A. The force of the explosive brings the coal out and throws the coal against the boards and planks and destroys them. Canvas is used and hung to the roof by spuds in many instances, being of course not injured by the force of the explosion.

By the Court:

Q. How long has it been since you have been in this particular heading, yourself? A. I really couldn't answer that question.

376 Q. Some time? A. Very likely.

By Mr. Oliver:

Q. If you have some screens in the morning you can illustrate the construction of the brattice? A. I should be glad to do so.

The Court: He may bring back his drawing as showing the locations.

Cross examination by Mr. O'Neill:

Q. This is a gaesous mine? A. Yes, sir.

Q. And that fact was well known to you as superintendent? A. Yes, sir.

377 Q. It is quite important in a gaesous mine that the ventilating system, including the brattices, be in perfect condition? A. Yes, sir.

Q. Because the gas forms quickly and may cause injury to life or property; is that correct? A. Well, I would like to ask what you mean by "quickly?"

By the Court:

Q. In this mine? A. This mine is no different from any other gaesous mine; they are all the same.

By Mr. O'Neill:

378 Q. I will ask you a little later. It is important, however, to have the ventilating system, including the air brattice and the partitions, in good condition so that they won't leak? A. Yes, sir.

Q. You go down into the mine from time to time, don't you? A. Yes.

Q. And make a general inspection of its condition? A. Yes.

Q. And you of course consider it your duty to see whether or not there are any defects which might cause injury to property or the life of the men? A. Yes.

Q. And if you saw defects in the air brattice or in the partitions, it would be your duty, as general

superintendent of this mine, to see that it was corrected? A. Yes. 379

Q. And you would have the power and authority to see that it was corrected, of course? A. Yes.

Q. The mine foreman is selected by you, is he? A. Yes, sir.

Q. And you select any competent mine foreman—any one that you want that may apply for the position and whom you think is good? A. Yes, sir.

Q. And you let him go whenever his services are not satisfactory? A. Yes.

Q. That is within your authority? A. Yes, sir.

Q. This particular place where this accident happened you say that the gangway or haulageway, which is the way through which the fresh air enters the mine, was driven towards the north. Is that correct? A. Well, no, it isn't exactly direct north. 380

Q. Well, about north? A. Well, it is north 40 degrees west I believe; but we call it north.

Q. I will call it north too. And it was driven for about 1,400 feet from the landing? A. Yes, sir, that is to the point where Yurkonis's place was turned off from it; not quite that but to the front of where he was working, say 1,000 feet from where he turned off, approximately.

Q. And when you got about 1,000 feet from the landing there was a working place or chamber which turned to the right or east and extended for about 400 feet— A. Approximately. 381

Q. To the east boundary of the property? A. Yes, sir.

Q. And this fourth cross cut was practically on the east boundary of the property? A. Yes.

Q. Or was it on the east boundary? A. Yes, sir, it was on the east boundary.

Q. Exactly to the east boundary? A. Exactly to the east boundary.

382 Q. The first, second, third, fourth and fifth cross cuts had been cut through by a miner starting from one working place in Yurkonis's chamber and another miner starting from Fein's chamber and driving towards each other till they met? A. Yes, sir.

Q. And the distance from Yurkonis's chamber to Fein's chamber was about 50 feet? A. Yes, sir.

Q. But when it came to the sixth cross cut which was Yurkonis's cross cut that was being driven from one side where? A. As far as Yurkonis drove it.

Q. There was nobody driving from the other side? A. Not at that time. I might say it was finished from the other side, however.

383 Q. Oh, yes; I suppose after he was hurt somebody else finished it?

By the Court:

Q. You mean that afterwards it was carried through from Fein's gangway? A. It was carried through from Fein's gangway; Fein's gangway wasn't driven far enough to start the cross cut to meet this; Yurkonis's place was driven down 21 feet when the accident happened. He was supposed to drive 25 feet, or thereabouts.

Objected to.

384 The Court: Leave the dimensions out; the answer that Fein's gangway was not far enough to the east to start the crosscut at the time may stand.

Q. And these crosscuts were 75 feet apart? A. These crosscuts were 75 foot centers.

Q. That is an unusual distance, isn't it? A. No, sir.

Q. Isn't a 60 foot surface the correct— A. The Anthracite Mine Laws provide that they should be

60 foot centers—not 60 foot centers, but 60 feet apart. 385

Q. How wide are they? A. About 10 feet.

Q. So that if they were 75 foot centers they were more than 60 feet apart? A. Yes, a trifle perhaps.

Q. It is quite a considerable distance, isn't it? So that you knew that these crosscuts were being driven at greater distances apart than the Anthracite Mining Laws provided? A. Yes.

By the Court:

Q. Do you mean actually five feet further apart?
A. Five feet further apart.

By Mr. O'Neill:

386

Q. And the reason you had the crosscuts further apart than the law permitted was so as to do away with the unnecessary work? A. No.

Q. Doesn't it do away with unnecessary work to have the crosscuts at longer distances apart? A. If you—

Q. Just answer the question. Doesn't it make the work less to have the crosscuts at greater distances? A. That is up—

Q. No; but nothing with me.

I object.

The Court: Answer the question.

Mr. O'Neill: Yes is the answer.

387

The Witness: Haven't I the right to answer?

Mr. O'Neill: You will later.

Q. The object of the Anthracite Mining Laws regulating the distance between crosscuts is for its effect upon ventilation, is that it? A. Yes, sir.

Q. That is to say, if there is a very great distance or a great distance between crosscuts it interferes with ventilation, doesn't it? A. Yes, sir.

388 Q. It is important also that the air from the brattice should come as close to the face of the rock to be blasted as is possible, consistent with not blowing the brattice down by the blast. Isn't that so? A. As practicable; not as possible.

Q. And indeed that is the reason why you make the end of the brattice frequently of canvas so that if it is struck by pieces from the blast it will not be like boards, destroyed? A. Yes, sir.

Q. So that wherever there is a cross cut made it is important to carry the air brattice in partly past the edge of the crosscut so as to give air in the crosscut? A. It is generally done.

389 Q. And it is good practice and good mining to do it? A. Yes, sir.

Q. Good mining requires it? A. Yes, sir.

Q. In this case if a current came along the gangway and came towards the north, and the gangway was shut off immediately beyond Fein's working place by the door so as to permit the air to be diverted into Fein's place— A. Yes.

Q. And then the air continued up through Fein's place and past the first, second, and third crosscuts in safety because those crosscuts had been blocked up by cement and building stone? A. Yes.

Q. None of it leaked or was dissipated? A. That is right.

390 Q. So therefore the quality of the air in Yurkonis's sixth crosscut depended to a very great extent upon the integrity and air tight character of the partitions in the fourth crosscut? A. To some extent.

Q. Because if they were in bad condition and there were holes in them it would to the extent of the holes permit the air to leak through that crosscut and to be dissipated out into the other passages? A. There were holes only in one.

Q. I didn't ask you about the holes.

By the Court:

391

Q. If the air leaked through the fourth crosscut it would never get into this brattice? A. Yes, if there was nothing in the crosscut yet there would be sufficient air left to reach the face of the working place.

Q. But whatever did go into the fourth crosscut would never get into the brattice? A. No.

By Mr. O'Neill:

Q. Good mining requires that it should be kept air tight and intact to prevent the air from going through? A. To the second inside crosscut up and not including the second inside crosscut; but everything outside of that.

392

Q. But even as to the second crosscut, the only object in putting up the boards and planking was for the purpose of preventing the air from going through? A. It was for the purpose of choking the air from going through there, yes.

Q. Well, the better you choked it the better it would be for the air up in the sixth crosscut, wouldn't it? A. I would like to explain that.

Q. Just answer, sir. A. But a straight answer wouldn't do; there are conditions in mining that—

Mr. O'Neill: I object to anything but a direct answer.

393

By the Court:

Q. I think you can answer that question and explain it afterwards as to whether the purpose of the partition in the second crosscut from the end is to prevent the passage of air? A. Yes, sir.

Q. The fifth crosscut of course was never open? A. Yes, sir.

Q. Was there an air brattice in that? A. Not in the crosscut, but from the end of the crosscut on each side.

394 Q. The right hand side carrying the air into
Fein's place and on the left hand side into the face
of Yurkonis's place? A. Yes.

Q. But there was no brattice in the fifth cross-
cut itself? A. No, sir; that would stop the ventila-
tion entirely if there was a brattice there.

Q. So that the air, in order to get into the sixth
crosscut would have to come through Fein's place;
instead of going directly into the sixth crosscut it
would have to go through the fifth and then along
the working place from the fifth to the sixth cross-
cut and then around the corner into the sixth cross-
cut? A. Until such time as the sixth crosscut was
395 connected between the two places, yes, sir.

Q. And that of course didn't exist until after
the plaintiff was injured? A. No.

By the Court:

Q. It hadn't been connected the day of the acci-
dent? A. No, sir.

By Mr. O'Neill:

Q. The brattice stopped between the fifth and
sixth crosscut, didn't it? A. The brattice in Yur-
konis's place extended from outside of the fifth
crosscut to the corner of the sixth crosscut and a
canvas hung from the end of the brattice down into
396 the face of the crosscut.

Q. You have heard all the witnesses say that it
stopped ten feet from the sixth crosscut? A. Yes,
I have.

Q. If that is true you do know that there was a
defect in your place, don't you? A. I know it is
not true.

Q. (Repeated.) If that is true you do know that
there was a defect in your place, don't you? A.
Yes, if true.

Q. For which you, as general superintendent

having charge of and superintendence over this place, would be responsible; is that correct? 397

Objected to.

Objection sustained.

A. No, I don't think it is correct.

The Court: For which the company might be responsible if this witness allowed it to exist; but not for which the witness would be responsible; that is a conclusion.

Mr. Thomsen: I move that the answer be stricken out.

The Court: Yes.

The answer is stricken out. 398

Brooklyn, April 1, 1914.

Met pursuant to adjournment as before.

HENRY G. DAVIS, resumes the stand.

Cross examination by Mr. O'Neill:

The Witness (referring to temporary structure erected against the door leading into the Judge's chambers, for illustration): The idea in putting up that brattice is to conduct the air current that is supposed to be coming through that crosscut into the place in which Mr. Yurkonis was working; this room being the place, for illustration. As you may imagine that this room is the working place in which this man was employed. This (indicating) conducts the air current right up into the face which is a short distance, perhaps 15 or 20 feet from the end of the brattice and from the end of the brattice—this (indicating) is supposed to be the roof of the seam—would hang a piece of canvas 16 feet long; the canvas is received at the mines in rolls 100 feet long, 6 feet wide and is cut up by the

399

400 store people into lengths of 16 feet; that is run from the spuds that are driven into the roof, a horse shoe nail or something of that kind is driven in, from which that canvas is suspended. When the miner fires a blast in the face he generally takes the canvas down and sets it alongside of his brattice boards. After the blast is fired he returns, and makes an examination of his place, with a safety lamp of this kind (Exhibit 6). Exhibit 6 is a safety lamp, but what we call a boss's lamp, this is a miner's lamp; this is a Davy lamp; the miner examines his lamp when he returns after putting up the canvas, to see that there is no accumulation of gas, before he permits his laborer to return.

401

By the Court:

Q. Does the miner at that time have an open lamp on his cap? A. No, sir; he is not supposed to have.

Q. The laborer with his open lamp is away from there? A. Yes.

Q. What happens if there is gas? What manifestation shows in the safety lamp; as the flame is elongated is there any difference in color? A. That depends upon the percentage of the mixture in the face of the place when the examination is made.

402

Q. Is the effect of explosive gas in the lamp to increase the flame in the safety lamp or to put it out? A. It increases it. If he has no gas he returns the canvas to its proper place and requests his laborer to come up to his work.

In this particular case this brattice was extended—this was on the day after the accident that I made the examination.

Objected to, what he saw the day after the accident.

By the Court:

403

Q. Had anything been done to the brattice?
Had any work been done there?

Objected to on the ground that the witness can't tell.

The Court: He can tell from the condition of the brattice.

Mr. O'Neill: He cannot tell the day after.

By Mr. O'Neill:

Q. Did the place show any indication of fire or of an explosion? A. No, sir, an explosion in such a place would be a physical impossibility.

404

Mr. O'Neill: He cannot tell the day after.

By Mr. O'Neill:

Q. Did the place show any indication of fire or of an explosion? A. No, sir, an explosion in such a place would be a physical impossibility.

Mr. O'Neill: I move to strike that out.

Motion granted.

Q. I say was there any injury to the brattice or to any of the parts? A. No, sir.

Q. How about the canvas? A. It was up.

Q. At the time you went there? A. Yes, sir.

405

Objected to.

The Court: It does not make any difference whether it had been partly down or whether it had been restored or whether it had been there all the time; he may say whether, when he went there the next day, there was a canvas.

Mr. O'Neill: We put on three witnesses to establish the fact that the brattice did not

406

even enter the cross cut at the time of the accident.

The Court: He is not talking about that.

The Witness: I am coming up to that.

Mr. O'Neill: Will your Honor rule on my objection?

By the Court:

Q. In building the brattice you have indicated that the open door would be the outlet of crossing No. 5? A. The inlet.

By Mr. O'Neill:

407

Q. In the gangway? A. Into Yurkonis's place.

Q. It would be the outlet from Fein's place into Yurkonis's place? A. Yes, sir.

Q. That direction of this temporary partition that you have made with screens and a canvas stretcher is the direction—Yurkonis's gangway went towards the place where he was working? A. Yes, sir.

Q. And then you say that the screens would extend in the said direction down the gangway? A. No, sir, this brattice as it appeared on the day when I made the examination extended to the corner of the crosscut.

408

Q. I say it would extend in the same direction down the gangway? A. No, sir, not in this case; the gangway or the place where Yurkonis was working had been finished; it had reached the line.

Q. Your property line? A. Yes, sir, our property line.

Q. And then the crosscut was turned to the right? A. Yes, sir.

Q. The other witnesses indicated by the other door the sixth crosscut? A. Yes, sir.

Q. Now will you indicate where your property line came? A. It extended to this point (indicating).

Q. That is, your property extended to the far side of the sixth crosscut? A. To the easterly side of the sixth crosscut. 409

Q. And no further? A. And no further.

The Court: Objection sustained on the testimony as it stands at present, and I will strike out any answer as to how far the brattice extended or how the canvas was arranged the day after the accident.

Q. How soon before the accident had you been there? A. Oh, I don't recall; in the Summer time.

The Court: Then we had better suspend, Mr. Davis, for the present. 410

Mr. O'Neill: I ask that the jury be instructed that they disregard this testimony.

The Court: The jury will understand that they may disregard any change that had been made that would not show the condition at the time of the accident.

By the Court:

Q. Your gangway is approximately 6 feet high? A. In this seam 5 feet high; that is the thickness of that face, 5 feet.

Q. How wide was the space from the pillar or side of the wall in the gangway to the vertical side of the brattice? A. That generally runs about 6, 8 or 10 feet. 411

Q. And how wide from the brattice across the rest of the gangway to the other side? A. The place is 20 feet wide.

Q. Then there would be 6 or 8 or 10 feet inside the brattice and from 10 to 14 feet outside? A. Yes, sir.

Q. From the top of the brattice chamber up is either rock or coal? A. It was solid rock.

412 Q. And the side of the brattice represented here by the screen and the blackboard was let into the top of the chamber—that is, into the rock? A. Yes, against it.

Q. Wedged in? A. Nailed to props.

Q. And the crosscut was also 5 feet high? A. Yes, sir.

Cross examination (resumed) by Mr. O'Neill:

Q. A brattice is a conduit of air, isn't it? A. Yes.

Q. Did it have any board ceiling or was the coal the roof? A. Rock roofed out.

413 By the Court:

Q. Then the air that was being circulated with that big fan at the outside of the mine would come in through crossing five behind this brattice as you have illustrated? A. If you were standing in the position that you are sitting in the main chamber or gangway it would blow in the direction towards the outside of the room; that is, exactly the opposite direction from which it was blowing inside of the brattice, that is, through the brattice.

By the Fourth Juror:

414 Q. Was the brattice airtight?

Objected to.

The Court: He may say whether they were made approximately tight or whether it was merely just a close fit.

A. Just an ordinary close fit, rough hemlock boards; no matched wood, grooved or tongued.

Q. Then it isn't made airtight; it is simply made to shut out— A. It is made to direct the larger portion of the current into the face of the working.

By Mr. O'Neill:

415

Q. It is not covered with canvas and cemented to make it more airtight? A. No, sir.

Q. Just rough boards? A. Yes.

Q. Have you a brattice foreman? A. We have a brattice man.

Q. Only one man? A. No, there are many of them; I couldn't tell you how many there would be in that mine.

Q. How many men were working in this mine at that time? A. I really can't answer that question.

Q. About how many? A. Approximately 350.

Q. The coal, of course, which was mined there was not only transported and sold to dealers, but also the locomotives of the Delaware, Lackawanna & Western would come along to this colliery and coal up? A. Yes.

416

Q. And then these locomotives, of course, would go out upon the railroad and carry the freight and the passengers of the company? A. I can't answer that question.

Q. Well, that was the design; they weren't coaled up for nothing? A. I presume that was the design; but then I don't know as to that.

Q. You have seen them coal up, haven't you? You have seen the big express locomotives coaling up there? A. No, sir, never.

Q. You have seen locomotives coaling up there, haven't you? A. No, sir, it is not a coaling station.

417

Q. All the coal is transported to the defendant's coaling station, is it? A. I do not know what disposition is made of the coal. We place it in railroad cars.

Mr. Thomsen: At this time the defendant concedes that it mines the coal which it uses in its locomotives in Interstate Commerce and that as a matter of fact and a matter

418

of law the coal which Mr. Yurkonis was mining was used in that way, and that we were engaged in Interstate Commerce.

Mr. O'Neill: This particular coal was not for the market?

Mr. Thomsen: No, we were both engaged in the Interstate Commerce at the time the injury occurred.

The Court: That is, the Railroad Company was engaged in business that would be Interstate Commerce and was getting its coal for its own purpose?

Mr. O'Neill: Yes.

419

Mr. O'Neill: Where is the drawing, the blueprint of that construction (indicating)?

A. The sketch I made last night is here.

Q. And where is the detail work; please produce the sketch you made last evening.

The sketch and the blueprint are both produced to counsel.

Q. What is the scale of the blueprint? A. One hundred feet to the inch.

The blueprint is marked Exhibit A for identification.

420

Q. Does it show the workings at this time? A. It shows the workings to the date of our survey.

Q. Show us upon this diagram the main gangway as it was driven towards the north, or practically so? A. This is the main gangway, here. (Starting at the shaft and making a heavy red mark along the main gangway.)

By the Court:

Q. Stopping at the point that you said was about 1,000 feet from the shaft? A. Yes. (Stopping at the beginning of Fein's gangway.)

By Mr. O'Neill:

421

Q. Will you mark an "F" at the intersection of Fein's gangway?

Witness does as requested.

Q. Now, go on down Fein's gangway? A. This is Yurkonis's chamber here (indicating with a broken line).

Q. You have shown on this diagram that the gangway was first driven about 100 feet to the east and then that it turned to the left and went north until it reached Fein's gangway? A. That is not exactly correct; when this reaches this point we encounter what is called an underlap fault (indicating the place marked "B gangway"). In order to get into this territory here we are compelled to drive a rock tunnel from this seam, cutting the coal right here at this point; that tunnel extends to the north from the point indicated by B gangway, 500 feet or 450 feet, rather, to the mouth of Fein's chamber.

422

Q. What is the distance then from the main gangway where it turns off into Fein's working place to the east boundary of the property (indicating from the point marked "F" to the east boundary of the property)? A. Four hundred and twenty feet.

423

Q. Now, show me in the fourth crosscut where you have the flat partition instead of the cement partition? A. (indicates by a red line).

Q. The air was driven in a northerly direction, wasn't it? A. Practically speaking.

Q. And it came up to the point marked "F" designating Fein's gangway, and how was it kept from going still further to the north? A. By doors; two doors located right at this point (indicating by marking two doors across the main gangway just north of Fein's, indicating by two red marks across the main gangway).

424 Q. Then the air continued along Fein's gangway and went through the fifth crosscut; is that correct? A. Yes, sir.

Q. Now, where did you put a door in Yurkonis's gangway to keep it from leaking back into the main gangway? A. It was unnecessary.

Q. Well, did you? A. No, sir.

Q. There was no door in Yurkonis's gangway at all? A. There was no gangway there at all; there was no need to drive it into Yurkonis's working place.

425 Q. Where did you put a door so as to lead anywhere else? A. Right here (indicating the doors of the main gangway to the north with the letter "F").

By the Court:

Q. Then the air in returning went clear through Yurkonis's gangway back to the main gangway? A. Back to the main gangway, yes, sir.

By Mr. O'Neill:

Q. There was nothing at all to stop it in Yurkonis's gangway, no doors? A. No.

426 Q. The east wall of Yurkonis's sixth crosscut was the east wall of the property; is that correct? A. Yes.

By the Court:

Q. Now, will you continue the red line from the point "F" down the Fein gangway or working place, to the fifth crosscut, and into the fifth crosscut? A. Yes, sir.

Witness indicates as requested a succession of arrows into the fifth cross cut.

A. At this point there is a door (indicating).

The witness indicates by a heavy red line that a brattice is built on the northerly

side of Fein's chamber so that the air passing to the east through the Fein's chamber goes to the end of the chamber and around the brattice and back to the west behind the brattice to the fifth cross cut, and he has indicated by a solid red line this brattice and the door shutting off the northerly half of the Fein's gangway at the fifth cross cut, indicating that air goes first along the southerly side of the brattice and around the easterly end and back, north of the brattice into the fifth cross cut.

427

By Mr. O'Neill:

Q. What were the doors made of? A. Rough hemlock boards.

428

Q. Not matched? A. No, sir.

Q. And not covered with canvas or concrete to tend to make them air tight? A. The door post, from the post to the rib of the place is built—

Q. I would rather you would answer the question. I asked whether the door itself was covered with canvas or concrete surface to make it air tight? A. No, the door was not.

Q. What was the width of those doors in the main gangway? A. About eight feet.

By the Foreman:

429

Q. Each? A. Yes.

By Mr. O'Neill:

Q. Was there only one door across the gangway and then another one beyond, or were the two right opposite each other? A. The one door was built at the outside end of that pillar; the other door was at the inside end of the pillar.

Q. Do you mean the south side of the pillar? A. One on the south side of the pillar and one on the north side of the same pillar.

430 By the Court:

Q. One near Fein's gangway and one near Yurkonis's? A. Yes, sir, so as to give space between for a mule and a cart to stand.

Q. How would an eight foot door fill such a gangway? A. The door is hung on a post and it is made to slam against another post and the space between the posts in each case—it is built up with stone or rock laid in concrete and cemented. We oftener use lime instead of cement.

Q. That is a permanent partition, then? A. Yes.

431 Q. And the door shuts with the wind? A. Yes, sir.

Q. And so the pressure of air would hold it shut? A. Yes, sir.

By Mr. O'Neill:

Q. So when you came along to Fein's gangway and got to the fifth cross cut you say that the door was placed on the westerly edge of the—that is, running north and south of the westerly edge of the fifth cross cut? A. Yes, sir.

Q. How wide was that gangway, Fein's gangway? A. Twenty feet.

432 Q. And how wide was the door and its faces? A. That would be about seven feet; six or eight feet; the ordinary width of doors.

Q. Did the air then in Fein's gangway towards the fifth cross cut go along the southerly side of Fein's gangway? A. Yes, sir.

Q. What was the distance from the southerly wall of Fein's gangway east of the fifth cross cut to the brattice? A. May I measure it on that map?

Q. Does that show the brattice? A. Yes, sir (measuring). I can't exactly give you that, but as I said before, about seven feet six inches, or eight feet.

Q. Did the brattice then also continue along the northerly wall of Fein's gangway to the east of the fifth cross cut? A. No; there was no brattice there; there is none necessary.

433

Q. The air just came back of itself? A. Yes, sir.

Q. Did the door on the westerly edge of the fifth cross cut in Fein's gangway completely obstruct the rest of this gangway except for the brattice? A. Practically speaking, yes; those doors are never built air tight; they are simply as a check.

Q. Then the air continued in through the fifth cross cut; is that correct? A. Yes, sir.

434

Q. Then of course it became necessary to have a brattice in Yurkonis' chamber to lead to the sixth cross cut; is that correct? A. Yes, sir.

Q. There was no door upon the fifth cross cut on the side where Yurkonis' chamber was? A. No, there was none.

Q. So, therefore, there was nothing to prevent the air, or a great quantity of it, anyhow, when it got to Yurkonis' chamber, from returning to the main gangway through Yurkonis' chamber; is that correct? A. No, it isn't correct; there was; the brattice would prevent it from going back until it had been conducted to the face.

435

Q. The brattice didn't fill the fifth cross cut? A. It extended from the outside of the fifth cross cut, from the outside corner of the fifth cross cut into the face; from the northwest corner of the fifth crosscut, as that sketch shows.

Q. The northwest corner? A. The northwest corner of the fifth cross cut. May I illustrate that with this brattice here?

Q. Well, the brattice anyhow on Yurkonis' chamber didn't fill up the entrance to the fifth cross cut at Yurkonis' chamber? A. It certainly

436 did; it filled it up, covered the entrance as this covers that door (indicating).

Q. It covered the entrance then, to the fifth cross cut in Yurkonis' chamber? A. Yes, sir.

Q. And then after it came out of the end of the brattice and at whatever distance it was up to the sixth cross cut, it returned along the southerly side of the brattice in Yurkonis' chamber? A. It returned along the northerly side, not the southerly, but the northerly side.

Q. I thought you got the air coming into the fifth cross cut in Yurkonis' chamber on the northwest corner? A. No, sir.

437 Q. You did say it; but you may have been mistaken.

By the Court:

Q. As far as the motion of the air is concerned, is this diagram correct? A. Yes, sir.

The diagram referred to was one made by the Court.

By the Court:

438 Q. I have left the blue line representing the brattice towards the sixth cross cut and the red line indicating the current of air as unfinished, because you have not been able to testify as to the arrangement of those parts at the time of the accident. A. Only the day following the accident.

The sketch is presented to the jury.

The Court: The red line indicates the direction of the air and the blue line represents the partitions and the brattices.

The Seventh Juror: Those doors were swinging the same way?

The Court: One swings towards Fein's and the other towards Yurkonis' place.

The Witness: No, sir, they both swing towards Fein's. 439

By the Court:

Q. Is the pressure on the Fein's side of the main gangway and the back pressure on the Yurkonis' side of these doors? A. No, the main pressure is the strongest in both doors swung in the same direction.

By Mr. O'Neill:

Q. The distance between the centers in the fifth and sixth cross cut was between 80 and 85 feet, wasn't it? A. From the center of the fifth to the sixth cross heading shows on that print to be about 80 feet. 440

Q. But it should have been only 60 if you had obeyed the law? A. No, the centers have no bearing at all upon the question.

Q. Then we will take from the working place itself; that is about 76 feet, isn't it? A. About 70 feet.

Q. Well, take Yurkonis' side of it. A. These are all free hand drawings. You can't expect them to be exactly right

Q. Take it at the edge of the fifth cross cut and run it back and let me know if you don't say that that is $7\frac{1}{2}$? A. No, sir, on a scale of 100 feet that will never measure $7\frac{1}{2}$. 441

Q. Is it over 7? A. It is over 7.

Q. That means it was over 70 feet from the easterly side of the fifth cross cut to the westerly side of the sixth cross cut. Is that correct? A. In that particular case, yes, sir.

Q. And that is the particular case involved in this accident; is that right? A. Yes.

Q. And you knew that the law directed that there should be only 60 feet. Is that correct? A. Yes, sir.

442

The Court: Where is that?

Mr. O'Neill: That is that this particular place, that over from the easterly wall of the fifth cross cut to the westerly wall of the sixth cross cut you say that the diagram indicates that it was a little over 70 feet; is that correct?

The Witness: Yes.

443

Q. What do you call a heading? A. A connecting place driven between two chambers, or between a gangway and an air way. They are known as headings in the Wyomissing Valley, as cross cuts in Lackawanna and as chutes in Schuylkill and Hazelton.

Q. You would call these cross cut headings; is that correct? A. Yes.

Q. And the chambers, Fein's chamber and Yurkonis' chamber, from which all the cross cuts led; you call those chambers? A. Yes.

Q. What is a breast? A. We call a chamber a breast in Schuylkill County; a breast is a pitching place driven up a pitch.

Q. How was the ventilation conducted on the other cross cuts when they were drilling from both sides? A. I can't answer that question.

444

Q. You don't know? A. No.

Q. How would it be done with good mining? A. The simple method, as was performed in this case would be employed; that of conducting the air current right into the cross cuts where places were advancing to the brattice.

Q. Conducted in from both sides? A. Yes; what do you mean by "both sides?" Towards both cross cuts? I mean, do you mean conduct on both—

Q. Into both cross cuts; into both ways that you were driving for the same cross cut. A. Sure; the simple method would be employed in each case.

Q. The depth of the cross cut, if a man is drilling it from below, conducts the air in there, doesn't it? It keeps the air and the possibility of gas gathering; the further he is from the breast or chamber? A. That depends. 445

Q. I say it is likely to, other things being equal. A. It depends upon circumstances and conditions.

Q. On which side of Yurkonis' chamber, between the fifth and sixth cross cuts was the brattice? A. The southerly side.

Q. How far were the brattice boards away from the southerly side? A. I can't answer that question; I didn't measure it. 446

Q. Was it about 6 feet? A. I presume possibly 6 or 8 feet; that is just about the average width.

Q. And then there would be a 14 foot space in to the north of these boards? A. Yes, on the other side.

Redirect examination by Mr. Oliver:

Q. Have you prepared a sketch showing the gangway at Fein's chamber and Yurkonis' chamber showing the coal in the solid, and the openings? A. I have.

Q. Will you produce that, please?

It is produced. 447

It is marked Exhibit C for identification.

Q. What does this represent? A. It represents—those two places and the main gangway and air way and the cross headings in connection therewith, as they appeared at the time of the accident; it shows the directions of the air currents.

Q. How is that shown? A. By red arrows. The brattice is shown in red by a dotted line, as near

448 as I can come to it and the doors by two side walls and the piece across at a small angle from the side or rib of the place. The blue marks in the headings show a stopping, the permanent ways by a double line, the temporary ones by a single line.

Q. What does the black indicate? A. The black indicates the coal, the Virgin coal; the red line appearing across the end of the paper—an arrow—shows the direction of the dip of the seam with its relation to Yurkonis' working place or the face of this chamber.

Q. Does that correctly represent the conditions at about the time of the accident? A. As near as
449 I can make them, yes, sir.

The diagram is offered in evidence.

By the Court:

Q. You have relatively, but not to scale, drawn this diagram? A. Yes, on this cross board paper each space represents about two-tenths of a foot, or something like that.

Q. Where you have a wider gangway indicated it is approximately the size of the gangway, and you have the crossing showing approximately the size of the crossing? A. Yes; I will explain that
450 by saying that this is a lead chamber and these are the gangways (indicating). In these places we indicate the rock as being taken out to make the necessary line for the distribution of coal, these gangways (indicating Fein's and Yurkonis' gangway). They are driven wide enough to gob the rock in, while on the main gangway and shifted airway the rock is loaded up in cars and taken either to the surface or to some other part of the mine to be gobbled in or dumped as worthless material.

The diagram is offered in evidence.

By Mr. O'Neill:

451

Q. You have marked here the way you claim the brattice was the day after the accident, have you?

A. Yes, sir.

Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained for the present, because of the indication of the way he found things, until that is connected.

Q. The air way in this mine runs parallel to the main gangway or haulage way, is that correct? A. Yes, sir, in this seam.

452

Q. And was it to the east or the west of the main gangway, or the haulage way? A. To the west.

Q. What was the distance between the main gangway and the airway? A. I can measure that on the print (witness measures). That shows about—close on to the 60 foot center, right there (indicating); that would leave about 50 foot pillar.

Q. Is this the air way? A. This is the air way (indicating No. 19 the plane air way).

By the Court:

Q. It is the air way for the 19 plane? A. Yes, sir.

453

By Mr. O'Neill:

Q. There are really of course sections of solid coal? A. Solid coal, yes.

Q. But this westerly air way, this westerly place is the air way; is that correct? A. Yes.

By Mr. Oliver:

Q. You have with you, I think, two kinds of lamps? A. Yes, sir.

454 Q. Will you kindly explain the use of the two
lamps that you have with you? Take them and ex-
plain their use. A. This (indicating) is the ordi-
nary day lamp, and is furnished by the company
for every miner in a gaesous mine at Wyomissing
Valley; the law provides that the miner before com-
mencing work, and after the firing of each blast,
shall make an examination of his working place
before his laborer is permitted to enter the place,
or his helper. In some of the mines nothing but
safety lamps are used (like Exhibit D1). A.
miner using this kind of a lamp, and the laborer
and other employees, such as a driver, car runner
455 and so on use what is known as a Clanney lamp
(Exhibit D2).

By the Court:

Q. Tell the difference between Exhibit 6 and Ex-
hibit D1? A. The principle of both lamps is pre-
cisely the same. The only object in changing the
design of the other lamp is so that it will set easily
on the bottom if the miner wishes to put it down
on the ground while the other one takes some time
to get to stand up.

Q. Then Exhibit 6 is the one that the officials
use? A. That is the bosses' lamp, used by the bosses
generally. This Clanney lamp is a safety lamp;
456 that lamp that I have presented here stands a test,
of an explosive current about 55 feet per second;
when it exceeds that, the flame passes the gauze and
an explosion takes place. Now the principle of
those three lamps is all the same, and while there
are many modifications of safety lamps, the prin-
ciple, of necessity, is the same. There is what is
known as the Wolf & Coler lamp. The only differ-
ence, in fact, is that in the Coler lamp—

By the Court:

Q. What is the general principle of the safety

lamp? A. The general principle of the safety lamp is that the temperature of the gas surrounding the flame when in an explosive mixture permits that mixture to burn within the gauze and yet prevents it from communicating with the gas outside. The minute the gauze reaches the temperature of the flame the lamp ceases to be safe and an explosion takes place. That is the principle upon which the Davey lamp was discovered. 457

Q. What is the purpose of the Davey lamp? A. Testing purposes, generally speaking.

Q. Testing for what? A. For gas.

Q. What is done when gas is found, by its aid? What is the general practice when gas is found by the aid of the safety lamp? What is the next step? A. If the gas is found when the assistant foreman is making his morning examination, in any place, that place is barred off; fenced off and the men are not permitted to work that day. 458

Q. I mean the person who is using the lamp when the gas is found? A. I was coming to that.

Q. Well, please answer that question? A. If the miner discovers any gas in his place after he has fired a blast or any time during the day, he understands that he is to immediately withdraw both himself and his helpers and report the matter to the foreman in charge of the mine. 459

By the Court:

Q. Suppose the miner is working with his open lamp; is the safety lamp lighted at the same time? A. Yes.

Q. Will the gas explode with the open lamp before the safety lamp will indicate gas? A. Yes.

Q. Well, then, what is the use of a miner carrying a safety lamp to test the gas if the gas explodes first with his open lamp? A. To make the examination with changing conditions that take place with every blast that he fires.

460 Q. Then the purpose of the safety lamp is not to let the miner know when he is finding gas while he is doing the ordinary portions of the work? A. That very seldom happens.

Q. It is only to test a place where his open lamp is extinguished or doesn't light? A. Yes, to make these examinations before starting to work after the firing of each blast.

By Mr. Oliver:

Q. Is this the glass lamp (indicating)? A. That is the glass lamp.

461 Q. What is the purpose of the glass lamp? A. The purpose of the glass in that lamp is two-fold: First, to increase lighting power; second, to permit a mine employee to travel through a return air current charged to some extent with an explosive mixture, without passing the flame. The Davey lamp, without any protection, will pass the flame much quicker than the Clanney lamp will, not being protected with that glass shield.

Q. Will either of the lamps detect the presence of standing gas? A. Yes.

Q. What is standing gas? A. Standing gas is gas that has accumulated in the place; the air current not touching it.

462

By the Court:

Q. The open lamp will discover that more quickly than either of the safety lamps? A. No, sir, not more quickly; but simultaneously; but the result is disastrous.

By Mr. Oliver:

Q. Will you go on and explain how gas accumulates; where it comes from and how it gets there and what is done with it, et cetera? A. Well, that is a big question, but I will do the best I can. This gas has been pent up for and as these openings are

developed the gas oozes out of the coal, and, being about half as heavy as the air itself, by the laws of gravitation it seeks the highest places in the mine; and if it is permitted to remain there without any air current being directed toward it it accumulates there and becomes standing gas.

463

Q. Is one of the purposes of ventilation to remove the gas as it comes out? A. To remove the gas—one of the purposes of ventilation is to dilute and render harmless the gases coming off from the mine, whether coming from the coal or from the breath of the men and animals.

Q. As the gas escapes from the coal how is it taken care of? A. The air currents are directed to the face of the places by such—as we try to show here, by brattices and so on; the canvas 16 feet long canvas piece is hanging at the end almost in every case.

464

Q. What does the air do to the gas? A. It dilutes it.

Q. Does it carry it off? A. It carries it off and it mixes with the air and becomes then, if there is a sufficient quantity of it, what is known as fire damp.

By the Court:

Q. Is the gas itself—that is, pure gas, less explosive or more explosive than gas mingled with air? A. It is not explosive; the gas itself is not explosive.

465

Q. When it is half and half it is explosive when mingled with air? A. When mingled with five and a half times the amount of air it will explode, but feebly. Nine and a half times the amount of air with terrific force; $13\frac{1}{2}$ times the amount of air makes a feeble flame, a blue flame.

Q. Then one to five and a half is slightly explosive? A. Yes.

466 Q. One to nine and a half is highly explosive?
A. Yes.

Q. And one to thirteen and a half is practically past the explosive point? A. It is about the same as five and a half; when it passes beyond that in each case it will not explode or burn.

By Mr. Oliver:

Q. Gas as it comes from the coal is in its pure state, is it? A. Yes, sir.

Q. Does it come out of feeders or blowers? A. Yes, sir.

467 Q. I wish you would just briefly and concisely explain what a feeder and blower is. A. A feeder or blower of gas is, for instance, if the place is wet, it will be shown by the bubbles of water that will be indicated on the floor of the working place, or on the side walls, or anywhere it will be shown; the water will bubble up just a little; in some places with a great deal of force, depending, of course, upon the amount of gas pent up.

468 Q. In other words, it shoots out of the cracks in the coal, and that is a feeder? A. It comes out of the cracks; it doesn't shoot very far as a rule; you would find it with the application of a safety lamp coming from the coal against the wall; but if your air current is good and solid it takes care of it and purifies it.

Q. Do the feeders and fires sometimes ignite? A. Very frequently.

Q. Where are they found? A. In the face of the workings generally.

Q. Up against the solid coal? A. Yes.

Q. Are they in a diluted or pure state? A. The minute they come out of the coal they cease to be pure; the laws of differentiation cause them to mix up and form a compound consisting of what is known to the chemist as CH_4 ; that is one volume

or one atom, rather, of carbon to four of hydrogen.

469

Q. As it comes out of the coal, whether or not that ignites without explosion? A. Yes.

By the Court:

Q. Because it requires some air immediately?

A. It burns just like gas coming out of a jet in your house; the minute you open the jet you get a mixture of air and gas that will burn; but if you can get that illuminating gas at a point where there is no mixture for it, it will not burn.

By Mr. Oliver:

Q. Do you know the range or inclination of the measure of coal where the sixth crosscut in Yurkonis' place were being worked? A. Yes, sir; five degrees to the dip, dipping to the south.

470

Q. In other words, the sixth crosscut was going down hill? A. Yes, sir.

Q. What would happen from any gas that would escape from the coal measures in the crosscut? A. It would immediately escape from the crosscut to the upper rib of Yurkonis' working place.

Q. Why? A. It being lighter than air.

Q. In other words, it would seek the top? A. Yes.

Q. Assuming that the air current was stopped: if there was an air current in there what would happen? A. Nothing.

471

Q. What would happen to the gas? A. It would be diluted with the passing current.

Q. And would the air current take it away? A. Yes, sir.

Q. So if there was no air current gas would escape to Yurkonis' chamber and if there was an air current the current would dilute it and take it away? A. Yes.

472 Q. As I understand you the gas will always go to the highest point? A. Yes, sir.

Q. And the cross cut being on a pitch, that is, down hill, the gas will go out of the cross cut into the chamber?

Objected to as calling for a conclusion.

The Court: I think he is competent to testify as to whether gas that escapes at the working place of the crosscut would be carried up the crosscut with a five degree dip.

By the Court:

473 Q. Would gas escape from the place where the coal was being mined with a five degree dip, and pass up the crosscut if there were no current of air? A. Yes, sir.

By Mr. Oliver:

Q. How much experience have you had in handling gases in mines? A. I have been connected with the anthracite coal mines in an official capacity for 21 years; I have worked, in all occupations in the mines, about 20 more years, which makes it about 41 or 42 years that I have been in and about the mines.

474 Q. During all those years what experience have you had in mines generating gases, explosive gases? A. I have had charge of mines generating explosive gases, as foreman and all of the mines in my division are gaseous colliers.

Q. Has your whole experience been in mines generating gases? A. All my lifetime, since I started to work.

Q. About 40 years? A. About 40 years.

Q. Have you had occasion to study the question of the action of gases, et cetera? A. I have; yes, sir. It is very important that I should know something with regard to their conduct.

Q. If there was no air current in the sixth crosscut gases escaping from the coal and on account of the pitch from the crosscut to the chamber, what would happen to the gases after they reach the chamber? A. If the air current stopped—

475

Q. With an air current in the chamber conducted by a brattice to within 10 or 12 feet of the corner of the sixth crosscut, not going into the crosscut at all? A. There would be no gas in the crosscut; there would be no gas in the chamber, providing the air current was traveling in its proper course.

Q. I will restate the question. With a crosscut extending a distance estimated at from 21 to 36 feet on a five degree pitch, generating gases, and leading from a chamber where the air was conducted by a brattice which reached within 12 feet of the corner of the crosscut, that was the end of the brattice—what would happen to the gas which might be generated in the crosscut? A. It would escape to the chamber and be mixed up with the air current and diluted, and rendered harmless.

476

Q. And removed? A. And removed. I mean by diluted, as Mr. O'Neill said yesterday, dissipated.

Q. In other words, under those conditions it would be impossible to have gas accumulate in the crosscut?

477

Objected to as to form.

The Court: He may answer whether in his opinion it would be impossible for gas to collect in the crosscut.

A. It would be impossible, yes, sir.

By the Court:

Q. Is that affected at all by the rate of escape—that is, the quantity of the gas escaping? A. Yes; if there was a large feeder of gas cut by the force from the face of the cross cut, that gas would im-

478 immediately endeavor to escape into the chamber, and at the point where that feeder or the contents of that feeder would come in contact with the air current it would practically become explosive, provided there was sufficient of it; but in the cross cut itself it would not be explosive.

Q. That is, it would be too dense in the cross cut? A. Yes, sir; I am assuming that it is a large feeder of gas, something we very seldom encounter. We do sometimes, but very seldom.

By Mr. Oliver:

479 Q. If a miner, just before firing the blast, examined his chamber with a Davey lamp and found no gas, assuming that there might be gas from feeders and the other conditions were as explained, the cross cut estimated at from 21 to 36 had a five degree pitch, and a brattice in the chamber extending to within 12 feet of the corner, what then would become of any gas under those circumstances, which might escape from the coal in the cross cut? A. There would be no explosive mixture, and the gas would escape to the highest point; and if the air current didn't strike it, it would rush in the upper corner of the chamber.

480 Q. In other words, there would be no gas in the cross cut? A. There would be no gas in the cross cut.

Q. After an explosion of gas of any kind, what is the effect upon the air current and the ventilation, etc? A. An explosion of gas generally destroys the air stoppings, brattices, etc., de-arranges the ventilation and consumes most everything that comes within its reach.

Q. If the gas escapes from a cross cut in the manner which you have described, what would be the purpose of conducting the air into the cross

cut by means of a canvas brattice? A. Men must have air to work; this gas in its purity will not sustain life; hence, it is necessary to ventilate every place for the health and safety of the men. 481

By the Court:

Q. Can you discover this gas by smell or taste?

A. It has no smell or taste in its purity, but when it mixes with the air, you may smell and taste it.

Q. But ordinarily the miner would not notice the escape of gas merely from smell or taste?

A. Hardly.

By Mr. Oliver:

Q. The canvas brattices are used for the purpose of furnishing atmosphere for the men to breathe? 482

A. Right up to the face; and take away the smoke when the blasts are fired.

Q. What is an explosion of gas—that is, a mixture of gas and air—what is the result of it? What happens when it explodes? Then what becomes of the gas and what does it do? A. As I said before, it will not explode in its purity, but when it becomes mixed with certain quantities of air, it will explode, the force depending upon the mixture. It also expands to nine times its diameter, regardless of the percentages of the mixture of air. For instance, if we find one inch of gas in the working place and we ignite that we will get nine inches of flame, and so on down. If we get one foot of gas we will get nine feet of flame. In other words, if there were six inches of gas in this place, this seam being five feet thick before the bottom of the chamber was cut, we would have 54 inches of flame. That would be about enough to burn a good many of us up. 483

Q. Out of the region where the flame extends

484 what evidence is there, if any, of an explosion? Suppose I were the same distance away from the explosion and without the boundary of the flame, would there be any evidence of an explosion to me? A. Yes, sir, you would feel the connection. It goes off very much like a large charge of powder, not with quite such a sharp tone in the noise being made by the explosion; it also creates a vacuum. We have a vacuum gauge that shows when an explosion of gas that amounts to hardly anything at all will show on the surface of the gauge what displacement has taken place by the explosion.

485 Q. How is that evident to a man—to Fein, for instance, in the next chamber? How would he know, outside of the noise, whether or not it was a gas explosion, assuming an explosion took place? A. Fein would be seeking a place upon the floor of his chamber.

Q. How would the fact that there was an explosion be shown or be evident? A. He would feel the force of it.

By the Court:

486 Q. On his ear drum or on his skin— A. On his ear drum at a considerable distance away; on his skin at that distance by the connection.

By Mr. Oliver:

Q. I want to know from your experience in the coal mines and as a miner of the Lackawanna, Wyomissing and Schuylkill Valleys, your acquaintance with the generation and explosive consequences of gas, when it explodes, if a man in charge of a working place or chamber, driving a cross cut or heading, being the sixth from the gangway, and had driven that cross cut or chamber a distance estimated from 21 to 36 feet, that the air was conducted into that working place or

chamber by means of a brattice which extended to a point about 12 feet from the inner corner of the cross cut or heading, and thence around the brattice through the fifth cross cut and into the return course, that the cross cut itself was being driven at a pitch of five degrees, whether or not in your opinion and in view of your experience that man having drilled a hole in the coal about five and a half feet deep, had charged the same with about fifteen inches of black powder, had made the usual aperture with a needle, inserted a safety squib and had left his light about three or four steps from the face of the working place, had made two attempts to light the squib with the touch paper provided, and the touch paper had gone out, the third time he did ignite the squib; what have you to say as to the possibility of such a man, under those circumstances and under those facts—assuming those facts—what have you to say as to the possibility of a man picking up his cap upon which was a lighted open lamp, lifting it to his head and setting off a gas explosion?

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Objected to as incompetent, irrelevant and immaterial; it is not the subject of expert testimony and the question is improper in form, and he is not permitted to testify as to what is possible or impossible.

489

The Court: I think the question up to the point where he attempts to raise the lamp to his head, is in accordance with the testimony, and I will let the witness answer whether under those circumstances he can say as an expert whether gas could be present so that an explosion could be imparted by the lamp; the question as it was framed was merely whether he could explode gas.

Mr. Oliver: Then I will change it.

490

The Court: He may answer whether in his opinion in those circumstances there would be gas present which would explode with the lamp.

A. No; that would be a physical impossibility for any gas to accumulate there with that air current circulating, as I said before.

Mr. O'Neill: Objected to; he is assuming something that is not there.

The Court: No; the air current circulating around the end of the brattice goes down within 12 feet from the air chamber.

491

A. Yes; 12 feet back from the corner of the cross cut as I understand it; it is traveling in there at the velocity that would send it right into the face even if the brattice was back considerably further.

By the Court:

Q. You mean that if the air was circulating around the end of a brattice it would create movement enough so that the gas would not have accumulated? A. Yes, sir, that is what I mean. The action of the air is very much the same as that of water.

492

Q. Well, if this miner's lamp had been placed on the ground three or four steps back of where he was working, if there was an open lamp, and the last time he had rested he had found no gas along the face of the coal where he was going to set off the charge, then the fact that the lamp had been burning and that no explosion had appeared before, would indicate that there was no explosive mixture—at least, on the floor where the lamp was? A. To that extent only.

Q. If the lamp had been used by him up to that time in his ordinary work and then had been set

on the floor, is your answer that under the conditions described there would not have been opportunity for gas to collect, if the air current was working? Is that what you mean? A. That is what I mean; there would be no accumulation of gas in the cross cut.

493

Q. That is, in the upper part, that would be reached by his raising the lamp to his cap? A. Yes, sir.

By Mr. Oliver:

Q. If, under any circumstances, a gas explosion might have occurred—in other words, if there were some of the elements present somewhere that we haven't discovered that would make it possible for a gas explosion to occur in the cross cut, and it did occur, what have you to say as to the possibility of a second gas explosion at the same place within a minute or two thereafter?

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Objected to as to what is possible or impossible.

The Court: I think from his experience he may say whether if, in raising the lamp to the cap, the gas did explode, whether there could be a second explosion of gas which would knock the man down twice before the blast was set off.

495

A. Impossible.

By the Court:

Q. Why? A. The first explosion would have destroyed all the elements in that atmosphere to sustain a second explosion; it would be impossible. The after damp from the first would be such that it would not sustain life nor a flame.

By Mr. Oliver:

Q. What is after damp? A. After damp is

496 what is commonly known as carbonic acid gas, one of carbon and two of oxygen—CO₂.

Q. In other words, does a gas explosion produce after damp or carbonic acid gas? A. Yes, it produces carbonic acid gas and carbonic oxide.

Q. And destroys the oxygen in the air? A. Yes.

Q. What have you to say as to whether or not if under any circumstances there could have been an explosion in this particular cross cut, the open lamp—what effect would that have upon the flame of the open lamp? A. It would extinguish it.

By the Court:

497 Q. Would it have any effect on the squib? A. It might ignite the squib.

Q. And it might not? A. And it might not.

Q. If it was already lighted it might explode it or not? A. It might explode it quicker.

Q. Then the flame of the explosion might light the squib? A. It might light the squib if there was sufficient flame to do that; but the force of the explosion would be very apt to destroy the usefulness of the squib as connecting it with the powder.

Q. Or the after damp might even put the squib out? A. It might even put the squib out.

498 Q. But it wouldn't set it off? A. No, sir.

By Mr. Oliver:

Q. If there were any such explosion would it put out the light? A. Yes, sir, it would.

Q. Then if the miner was in his chamber and there was an explosion caused by igniting a body of gas with the open lamp and the only light which the miner had in such a place were a gas lamp and a Davey lamp and an open lamp and there was a squib there, what, if anything, could there be to set off a second explosion, if it were possible to have a body of gas to explode? A.

Nothing; the squib wouldn't do it; there must be a flame, or a spark to ignite gas, and the squib just glows, burns slowly and glows. 499

Q. In other words, if there were the first explosion, it would be by the light and there would be nothing left to ignite the gas for a second explosion under any circumstances? A. That is right.

Q. Have you had any experience during your various occupations as in charge and in connection with coal mines in treating or in handling men who have been burned by gas explosions? A. Yes, sir, I have quite some.

Q. Through how many years does that go? A. Well, that extends over a period of 20 or 25 years. 500

Q. How many men have you known or about how many have you come in contact with who were burned or injured in any way by a gas explosion, by being in the explosion? A. Oh, I couldn't give any estimate of that.

Q. Could you approximate it? A. No, I could not. I am trying to think of the worst explosions that I have had anything to do with in my experience, as being where there have been six or seven men quite severely burned at one time.

Q. I want you to take into consideration the men who have been in gas explosions where explosions were relatively slight, as well as the large explosions. A. I can't give any estimate as to the number; a great many. 501

Q. Has it been over several hundred? A. No, I don't think so.

Q. Has it been over a hundred? A. No, I think not; not over a hundred.

Q. Have you had occasion to know any, and if any, whether many or few men who have been injured in gas explosions by being in the explosion in other mines than those with which you have had anything to do? Have you known other—

502 By the Court:

Q. Have you known men that were injured in other explosions? A. Yes, sir.

Q. Many of them? A. Yes, quite a number. I make it my duty—

Q. How many have you seen in all? A. I really couldn't estimate.

Q. More than a hundred in all? A. No, I don't think so.

By Mr. Oliver:

503 Q. You have also seen men who have been injured by being what the miners call shot by the blast going off and having an explosion of powder? A. Yes, sir, a great many.

Q. From your experience in that way are you able to tell from the physical evidence upon a man's body the difference—can you tell whether or not a man has been injured by one or the other? A. In my opinion, I am; yes. But from a medical standpoint maybe I wouldn't be; I can point out in this room men who have been injured by powder and men who have been burned by gas.

Q. When you see an injury are you able to tell whether it is a gas or powder explosion? A. I certainly can.

504 Q. Have you had occasion to look upon Mr. Yurkonis? A. I have not.

Q. Will you come down here and look into his face?

Mr. O'Neill: We object. We make no dispute that--

The Court: The testimony is that the powder was exploded, and as the testimony stands at present there is no testimony to contradict it.

Q. In case of a man working in a crosscut such

as we have described and under the conditions which might result in an explosion such as he has testified to, what injuries, if any, from the explosion of the gas separate and apart from any injury to him which he might receive from the explosion of the blast would such a man receive under those conditions, if you know?

505

By the Court:

Q. Can you tell what injury a man would receive by an explosion of gas that would knock him down?

A. I cannot.

By Mr. Oliver:

Q. In case of a gas explosion in a crosscut with sufficient force to knock a man down do I understand that you cannot tell us what physical evidence would result from such an injury? A. That wasn't the question that I answered.

506

Q. Now, will you answer that question?

Objected to as incompetent, irrelevant and immaterial.

The Court: You can tell whether the man would be hurt or not, so that there would be physical evidence of his injury.

Mr. O'Neill: Objected to; it must be apparent that this is all conjecture.

The Court: No. If it is a matter of expert experience in a coal mine, the mere explosion of gas sufficient to knock a man down will do something to his body so that it can always be told, he may answer.

507

A. I have seen many of them and have been burned several times myself.

By the Court:

Q. Is there anything on you that would indicate?

A. Yes, sir, on my back there is; under my cloth-

508 ing. In the Winter time it would show itself on my hands and face.

By Mr. O'Neill:

Q. Knocked down by burns which came from the top of your head and knocked you down? A. That isn't the idea of knocking down, as I understand it.

By Mr. Oliver:

Q. I will put the question in this way: if a man in an explosion, that is, at the point where the explosion occurs, says that it is sufficient at that point to knock him down, whether or not such a man in such an explosion will bear, after his injuries have been treated, the evidences of the fact that he was in such an explosion? A. He certainly will.

509

Q. Can you tell those evidences? A. Yes, sir.

Q. If you were to examine Mr. Yurkonis, he having testified that he was in an explosion at the point of the explosion in the crosscut, and that it had sufficient force to knock him down, could you tell by an examination whether or not he bears evidences which show whether or not he was in such an explosion? A. I think I could.

Q. Will you do so, please?

By the Court:

510

Q. Would that be affected by the question of whether or not he had received the force of the explosion in his face? A. That is a question I wouldn't like to decide; of course if this man was in this place when even a slight explosion of gas would take place, it would show itself upon his flesh.

Q. Then if the shot went off in his face, do you think you could still tell? A. I think I could; there is a very marked difference between burnt flesh and that peppered with powder and coal.

The Court: You may examine him as to how he can tell. 511

Mr. O'Neill: I won't cross examine; if he wants to swear to any such thing as that, he can. He has already shown that he cannot tell.

By the Court:

Q. Was this gas explosion one that you set off by a lamp on your cap? A. No, it was set off at a considerable distance.

By Mr. O'Neill:

Q. Suppose this man, in other words, rose up and put his lamp up near his face: If gas happened to be near the roof, it might light at first and not explode; isn't that correct? A. No, sir, that isn't correct. 512

Q. Does gas always explode as soon as it lights? A. Instantaneously; whenever it comes in contact with a flame explosion takes place, the force depending upon the quantity.

Q. And it lights? A. Yes, sir.

Q. And it becomes nine times its amount instantly? A. Yes.

Q. So that if a man is in a five-foot rise and he lifts up and his flame gets in contact with it, instantly the flame gets nine inches deep from the ceiling? A. Yes. 513

Q. From that he may receive a burn on top of his head? A. Yes, sir, he might.

Q. If he is thrown down the gas could then very readily light up a squib, couldn't it? A. Not in this case.

Q. Oh, of course, nothing in this case; but I am talking about the ordinary case. A. But you must assume a position in each case. This can't in a vein five foot high ignite one inch because there is a nine-inch flame there. There is no force to have

514 it throw that down. If he stood in it it would burn his shoulder.

Q. It is a force to what inch flame? A. Well, it develops as the square of the quantity.

Q. In this crosscut how does it develop? A. How much gas was there there?

Q. Let us assume enough to knock him down. How much would it take to knock him down if the gas was right there? A. About six inches of gas in that crosscut would not only knock him down but everybody on those two ribs would go down with that force.

515 Q. You are always careful to make it sufficient gas to knock people down in the other crosscut? A. I want to make it truthful; I wouldn't lie for the Delaware, Lackawanna & Western Railroad Company.

The Court: The question is confined to enough to knock the man down, but not to—

Q. With gas lit up would it be likely to burn up this squib quickly and cause explosion? A. It might.

516 Q. Well, would it knock him down because it was only five feet high and a good deal of gas lit up every nine inches? Suppose a man did go down, you wouldn't want him to stay up there if he were burning, would you? A. No.

Q. Suppose he did go down and received some burns from the gas, and instantly afterward the gas lit off the fuse and the fuse went off. A. Not under those circumstances. Let me explain that.

Q. Suppose the fuse did go off. A. There is no suppose; it would be impossible; it can't go off with nine inches of flame reaching a place that is located 20 inches from the roof.

Q. Who told you it was 20 inches? A. My recollection; I was there. Nothing had been done before I got there.

Q. The coal had been blown out, hadn't it? A. Just that one shot; but the corner of the hole was there.

517

By the Court:

Q. You mean you measured the distance of this particular shot from the roof? A. Yes, sir, and it was 20 inches down from the roof.

By Mr. O'Neill:

Q. If there were three inches of— A. It could come down below provided it was possible; but it is impossible for it to be there.

Q. If it was three inches of gas it would be 27 inches, wouldn't it? I would like you to admit that nine times three is twentyseven. A. I will do that.

518

Q. The point is that if a man received a burn, and a few seconds thereafter an explosion of powder went off and coal was thrown out at him as he laid there on the ground or in a semi-recumbent position, do you say that if the burn marks and the powder marks were closely together and to some extent occupied the same expanse that you could differentiate one from the other? A. I think so, yes.

Q. Have you seen cases where a man would be burned by the gas and then the gas light a squib and cause an explosion? A. I have not.

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Q. You never saw a case like that, where a man would be burned first and a few seconds thereafter would have powder and coal thrown at him? A. I never saw such a case.

The Court: I will let Mr. Davis look at the plaintiff and say whether he sees any evidence of a gas explosion or not.

The Witness: I understand the question is whether or not in my opinion this man

520

suffered from the explosion of gas before the shot went off and marked him as he is marked here.

The Court: No, the question is whether you see on his face anything caused by a flame, that is, a gas explosion.

The Witness: No, sir, I don't see anything to indicate that that man was burned by gas.

Q. Do you know how burns are distinguished in their effect on the skin? A. I couldn't go into that detail. There are doctors that can do that.

521

By the Court:

Q. But unfortunately you are testifying like a doctor. That is why I ask you do you know that burns are known in the medical profession by their degree? A. Yes.

Q. And what degrees? A. Do I know in what degrees?

Q. Yes. A. I do not.

Q. You don't know that they are known as first, second and third degree burns? A. No.

Q. Or that burns of either type have a different effect on the skin? A. No.

522

By Mr. O'Neill:

Q. Do you see a place on the top of this man's head where he has not what the doctors call true skin? A. Yes, I see it.

By Mr. Oliver:

Q. I don't know whether I asked you this or not: If there was an explosion of gas caused by Mr. Yurkonis' leaving his light, assume that there was gas there to explode, whether or not the flame expanding would envelope his head. A. It

certainly would if he didn't dodge it, as we say in mining.

523

Q. Would he have time to dodge it before the explosion? A. Depending upon the quantity; if it was one inch or so, he would; but I question if there was three inches there whether he could dodge it or not.

Q. Would he have time to dodge it if the force of the explosion was sufficient to knock him down? A. No.

By Mr. O'Neill:

Q. It so frequently happens that miners do dodge it? A. They dodge a small quantity.

524

Q. Isn't it a fact that sometimes gas will light up on the side of the working place, without an explosion? A. Yes, oh, yes.

Q. You must have understood me before when I asked you that question. The fact is that gas might light without any explosion? A. Oh, yes, sure; that I explained before.

Q. What is the cause of it lighting without an explosion? A. For instance, if the naked light would come in contact with this wall, assuming that this is the wall and there is gas oozing out, it would ignite.

Q. Why wouldn't it explode? A. Because there wouldn't be enough of it. The air current would dilute and render harmless all the gases, coming out of there.

525

Q. But if the air current wasn't good enough, then of course, it would explode? A. If it wasn't strong enough to diffuse the gases, then it would explode, yes.

Q. Of course, if there were holes and breaks and boards out, or bent down in the fourth cross out, it would to that extent affect the current of air which went through Fein's place? A. It would reduce it, but very little.

526 Q. I just asked you if it would affect it. Do you say yes or no? A. Yes, it would affect it.

Q. How often have you testified for this company? A. Not very often.

Q. Well, how often? A. Two or three times, perhaps.

Q. Is that all? A. That is all.

Q. Don't you remember any more? A. I don't recall; I don't think so.

Q. Does this detail show that there was a dip towards the south, the blue print? A. I really don't know whether it shows there or not.

Q. Just look and see. A. I can't see it there; I can't see that it is marked there.

527 Q. Are there any marks there, or any dips? A. No, I can't find any now.

Q. Coal is also blasted with dynamite, detonating battery, isn't it? A. Yes, sometimes.

Q. In that case of course, the batteries are taken out of the crosscut into the working place and there is no light in at all near the explosive? A. Yes, sir.

Q. That is a safe way to mine, is it? A. That is one of them.

528 Q. That is the safest? A. There is some doubt about that. We have had more men killed by the use of a blasting battery within the last few years than in any other way, by premature blasting going off.

Q. Properly done, it is the safest way, is it? A. Well, that is a question.

Q. I mean there is no light brought in the presence of the explosive? A. It is a saver from an explosion of gas; but the blasting of coal is never permitted where there is standing gas. The object of the blasting with an explosive, as a rule, in almost every case, is to prevent the ignition of the gas in the coal, thus avoiding mine fires; not explosives.

Q. But the principal danger from blasting with dynamite is the possibility of a missed hole; isn't that correct? A. Not necessarily; there is a danger in a delayed blast that is charged with dynamite, particularly where you use the fuse; but fuses for blasting coal is never permitted.

529

Q. By a fuse do you mean these things (handing witness fuse)? A. Yes, that is a fuse.

Q. That is never used for blasting coal? A. That is never used for blasting coal in our region.

Q. Either dynamite or powder? A. Oh, yes, to blast with dynamite in rock, but not in coal. In rock over or under the seam or in the rock tunnel.

Q. But you would blast coal also with dynamite and battery, wouldn't you? A. We blast coal with what is known as permissible explosives.

530

Q. Well, is dynamite permissible? A. Yes, a kind of dynamite.

Q. And a battery? A. Yes.

Q. Do you know whether the first, second or third cross cuts have been made partly with dynamite? A. No, I do not think so.

Q. You don't know? A. No, I am not positive of that.

Q. In these mines the men, in addition to those two lamps have an open lamp? A. Yes.

Q. When a man goes to work in the morning he goes to a window or shanty and calls out his number? A. Yes, sir.

531

Q. And if the place is all right, he is then told whether it is all right for him to go to work? A. Yes, sir.

Q. And if it is right he goes down to the mine with his safety lamp and his open lamp? A. Yes, sir.

Q. And if it is not all right the open lamp is taken away from him if he is allowed to go into

532 the mine? A. He is not permitted to go into the mine.

Q. All I mean is his working place; he is not permitted to go down in the mine if his place is not in good condition? A. Yes.

Q. Then the fact that he is allowed to go in with an open lamp is assurance of safety to him that there is no gas there? A. That is right.

By Mr. Oliver:

Q. To what extent does the fact that he is allowed to go down in the mine with an open lamp—at what times? A. That is between the hours of 6 and 7 in the morning.

533 Q. I mean with reference to the working day; having no gas when he began work or after he started, or when? A. When he begins work, the place has been inspected, and that inspection is to be made within three hours of the time he is supposed to get there.

Q. But gas can accumulate during the day while he is working? A. Every blast that he fires changes the condition of his place, and he is provided with that lamp to examine it (referring to Exhibit D1). In order to ascertain the condition of the place after the firing of each blast.

534 Q. Mr. O'Neill asked you some questions about the door in Fine's place. Can you, with the aid of that apparatus you have there, explain why no door was necessary? A. There was a door in Fine's place, but none in Yurkonis' place; neither was there any needed. The door in Fine's place would be closed to drive the air current into Fine's place, and just as if it were a part of the brattice; in Yurkonis' place the air current was coming, or Fine's place through the cross cut—(indicating by two round dots the door in Fine's place).

By Mr. O'Neill:

535

Q. I was referring to a door back between the fourth and fifth cross cuts? A. No.

Q. These doors successfully prevent the air from going through don't they? A. Yes. These doors prevent the air currents from taking a short cut.

Q. You say that in good mining you keep the second cross cut from the one which was being cut, not permanently closed, because in the event of some disaster or casualty the men have to get out? A. That is one reason; there is also a possibility of a fall of roof taking place, from a mine fire occurring. If there is a coal—if there were two or three car loads of loose coal in these places and the coal was set to burning we couldn't be able to come in to fight the fire without entering this side, and would have to build up a passage and force the air current through.

536

Q. Why wouldn't a door in the fourth cross cut accomplish all those purposes? A. Someone would leave it open maybe going through there. Someone might pass through that door and leave it open; the men have their powder boxes here (indicating the temporary partition).

Q. A man might leave any one of the doors open; but a door is more air-tight, isn't it? A. These doors have attendants.

537

Q. By putting up this board partition here on the fourth cross cut and not having a door made, what would be the necessity of having an attendant? A. No, we never put doors in cross cuts.

By Mr. Oliver:

Q. In other words, the difference between the brattice in Fine's and the brattice in Yurkonis' place was that one was a fence with a gate in it and the other didn't have a gate? A. Yes; a gate or door. It is called a gate by some and a door by others.

538 DAVID H. LAKE, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. Thomsen:

I live in Kingston, Pennsylvania. I am a practicing physician and surgeon.

Q. Where do you carry on that business? A. At Kingston, Pennsylvania.

Q. How long have you been a practicing physician and surgeon in Kingston, Pennsylvania? A. I have been there since November 1st, 1886.

Q. Are you acquainted with the plaintiff in this action, Mr. Yurkonis? A. I know him as such, yes.

539 Q. You have seen him on prior occasions than today? A. I have.

Q. Where? A. I have seen him in the office at the Pettibone Mines, first of all, at the time of his injury.

Q. And after that, where? A. I saw him at the Moses Taylor Hospital in Scranton, and have seen him on the street in Luzerne, if I mistake not; that is, Kingston.

Q. How far is the Pettibone mine from Kingston, about? A. Perhaps a mile and a half.

Q. Where is the Moses Taylor Hospital located? A. At Scranton.

540 Q. How far is that from Kingston? A. Seventeen miles.

Q. Are you at all connected with the hospital? A. Not with the Moses Taylor Hospital, no.

Q. On the sixth of July, 1911, you say you saw the plaintiff for the first time? A. For the first time, yes.

Q. And you saw him then at the Pettibone mine? A. At the mine office, the outside mine office at the Pettibone colliery.

Q. How far was that from the shaft? A. 150 feet or more. 541

Q. That office is a structure on the outside of the mine? A. Yes.

Q. On the surface? A. On the surface.

Q. What time of day did you get there on that occasion? A. I don't know just what time it was.

Q. About what time, do you remember? A. Sometime during my rounds, because I was out making my calls and drove there in a hurry.

Q. You were called there? A. Yes, sir.

Q. What for? A. To take care of this man.

Q. Did you make some examination of the plaintiff at that time? A. I did. 542

Q. A physical examination? A. I did.

Q. Go on and state as to what condition the plaintiff was in at that time, so far as you observed. A. I found him suffering from a shock and from lacerations and contusions upon the face and head, and a broken leg, as I remember it now, his right leg. I have no doubt it was that. The condition of shock was such that I removed what dressings had been placed upon him in the mine hospital under ground, and administered a hypodermic injection as a stimulant for him, bathed his face and head with bi-chloride of mercury solution, which in cases of this kind when a man meets with an accident which causes a shock, prior to the removal to a hospital and watching for the ambulance car or so-called ambulance car; that is routine treatment with me; I apply bi-chloride of mercury solution to wounds of this kind. This man was unable to open his eyes at the time, and I examined his eyes very closely and cleansed out a great deal of fine coal, perhaps spending more time than I otherwise would, because we were waiting for the arrival 543

544 of the hospital car to take him. When the car came, perhaps in twenty minutes or half an hour from the time I got there, we placed the man in it and had him transferred to the Moses Taylor Hospital in Scranton.

Q. Did you accompany him on that trip? A. I went as far as the Luzerne ferry.

Q. How far is that? A. About a mile and a half from the mine, or perhaps a mile and a quarter, and saw that he had two men—we usually send two men with the injured man to the hospital, and I did not go with him.

545 Q. What experience have you had in treating cases of personal injury received in mining accidents? A. My experience has been rather a large one.

Q. Just state what it has been. A. I suppose that probably one-third of my work is mine work and has been for all these years that I have been located in that one place.

Q. That point is about the center of the Anthracite district in Pennsylvania? A. It is the center of what is known as the Wyomissing Valley district, a large district.

546 Q. From the examination of the plaintiff which you made on that occasion and from your experience which you have had in these mining accidents and treating them, are you able to state whether or not the plaintiff had any indication of burns from gas explosion? A. This man was not burned; he was shot in the face by what is known there as a blast given out from the face; they are frequent accidents, unfortunately.

Q. How can you tell that? A. Well, the face was cut in a great many places; perhaps fifty or sixty places. Coal was imbedded under the skin down into the deeper tissues; the man was cut in several places and the tissues were lacerated

and matterated and contused by the frightful force of the explosion, and the imbedding of coal, the slate and some powder, no doubt, buried right in these tissues. It was a mass. You couldn't remove all of the coal, you couldn't remove it without cutting off down deep into the tissues, which we seldom do. A man perhaps wouldn't recover if we attempted anything of that kind.

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Q. Assume that a man had been involved more or less or knocked down by an explosion of gas in a mine, and almost immediately thereafter had received the effects in his face of a charge of coal or powder, or whatever comes away from explosions of a blast in a mine, receiving the effects of that when he was close to it, within four or five feet, perhaps, immediately after the gas explosion. Could you tell from a physical examination of that man then whether or not he had been burned by the gas? What I mean is whether the explosion that already destroyed the evidences of what had happened, would be from the gas?

548

Objected to as to form.

The Court: He may say whether he could answer such a question.

By the Court:

Q. Could you or not tell whether there had been fire or explosives before the shot? A. I certainly could.

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By Mr. Thomsen:

Q. How could you tell that? A. There would be marked evidences of burn; either of one degree or of another degree, upon the tissues not involved. The tissues very generally were involved in the lacerations and in the contusions; but there was some flesh not involved. Most of it was, however, but there was enough left to show

550 that there were no burns. My examination was too complete—I was compelled to make a very complete examination in this case first of all to resuscitate the man from shock, to administer hypodermic injections; doing it was necessary to wash a portion of the flesh in order to make the parts as clean as possible before introducing the hypodermic needle. There was no burn in this case that I could find.

Q. Is there any difference in the treatment which is given for burns and for contusions? A. Very great.

551 Q. Would there be any different treatment if the man were burned as well as contused? A. Well, you would, in a case of that kind, have no difficulty.

Q. You would have sent him to a hospital whether he was burned or bruised? A. Yes.

Q. The local applications which you made yourself, would they be any different in the treatment of a patient who was burned and one who was contused or as to a patient who was burned and contused? A. In a patient who was burned and contused I would use a modified treatment. I would not have used the treatment that I did for a burn case.

552 Q. Why? A. In a burn case where the burn is general, and if it is deep at all, or even if it is simple, absorption takes place so rapidly that we might have had a case of mercurial poisoning here. I can afford to wash out lacerations where coal is imbedded in these tissues with such a solution, where I wouldn't do so in a burn case, because the tissues apparently absorbed so rapidly the application that is placed upon them. For instance, in treating burn cases we apply emolient solution of some soothing application; something very soothing. About the mines we use a bicarbonate of soda solution which is soothing, allays the intense burn-

ing sensation. There is no intense burning sensation in the tissues that are lacerated. A man in that case suffers more from shock than the man who is slightly burned. The man who is slightly burned will frequently want to walk home. A man suffering from shock as the result of deep lacerations of the tissue of the head has to be carried up on the ladder into a convenient place and nursed back for several hours before he regains his semi-normal condition which you would expect in a case of that kind. Burn cases recover more quickly than cases of laceration. We will frequently send a man who is burned—burns of the second degree, even, out on the street in two weeks' time. A man with these lacerations that we find following explosions such as this man had, the bursting out of coal, cutting him in so many places, he will not return to work for any work for many weeks at times. A burned man we send back to work sometimes in three or four weeks; some of these men, it is all we can do to make them go home in an ambulance. They want to go home rather than frighten their people, if they are moderately burned.

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Q. Will you step down from the witness stand and examine the plaintiff now as far as his head and face are concerned?

Witness does as requested.

555

Q. You have just examined, here in the court room, the plaintiff, have you? A. I have.

Q. What do you find present there today, so far as any evidence of contusions or burns are concerned? A. Very many evidences of contusions and some lacerations; but no evidence of burns.

Q. Did you examine also the top of his head? A. I examined his head and face.

Q. You examined all the scars and marks on his

556 head? A. I think I examined them very carefully.

Q. There is no evidence of any burn on the top of his head? A. No evidence of any burns on the top of his head, of a gas burn anywhere, or any other burn. I found no evidence of any burn upon his head, as a result of any accident whatever.

Q. What is on top of his head? A. He is as bald as I am; there is apparently a rough scar there which might be due to a brush burn; that is, a scraping of the surface; he has another upon his arm; he had several at that time, that was not done by fire; that is done by scraping.

557 Objected to as saying it was a brush burn.
The Court: We will leave it to the jury.
The first thing is to see if you are referring to the same thing.

Q. There was one scar on top of the plaintiff's head that has been referred to here in Court and heretofore, which is about $\frac{3}{8}$ of an inch wide and 2 inches long, which is covered by I think what was called some kind of skin; scar tissue. Did you notice that place on the plaintiff's head? A. I hardly call that scar tissue.

Q. Did you notice that? A. Yes, sir, something there; a little brush burn I consider it; that is the same place I spoke of just now.

558 Q. What is that? A. It is produced by contact with a roughened surface and that part of the body injured, over that roughened surface—an erosion of the skin.

By the Court:

Q. Without heat? A. Without heat, yes. The term is unfortunate, but we use it in our section so much that it is well understood there.

Q. You don't mean that the friction produces any burning; it simply destroys the tissue? A. It simply destroys the tissue.

Cross examined by Mr. O'Neill:

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Q. What is the extent of the scar tissue on the top of the head? A. I didn't measure it.

Q. Well, at that place there is no true skin, is there? A. Yes, I would call it true skin.

Q. Do you know what is called true skin in medicine? A. Derma.

Q. Do you find that there? A. Some is there.

Q. On the rest of his head there is; but I am talking about this place 2 inches long and $\frac{3}{8}$ of an inch wide. A. I think that is derma, yes, sir.

By the Court:

Q. Is a considerable portion of true skin missing from that place that is covered by the scar tissue?

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A. There is some missing there; but I don't think it is 2 inches; if it is 2 inches long I fail to see it; I fail to see a large place. I find somewhere there has been a growing over of tissue. I still think that is an extension due to medication of true skin from the other side.

Q. Are you the company's doctor? A. Yes, sir.

Q. How long have you been such doctor? A. Oh, 13 or 14 years.

Q. About how many cases do you treat a year, of persons whose bodies are injured by shot? A. Do you mean generally? Not in our company? In my private practice?

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Q. Yes. A. Well, it varies; I have sometimes 4 or 5 people under my care at once, and it is fair to assume that I would have seen since I have been located there an average of from 8 to 10 burned cases every year; we do not see so many cases now as we did formerly; in my hospital experience I see quite a number even now.

Q. It was somewhat difficult to examine the man's skin because of the quantity of dirt and coal that was in the skin? A. I removed a great deal of dirt in order to dress the case.

562 Q. Was it somewhat difficult, or not, to examine the skin because of the dirt? A. Absolutely not difficult to examine the condition of the skin that was left whole there.

Q. Was it difficult to examine the skin which was injured? A. The skin that was injured was imbedded with coal, and there was very little of the true skin there at that time, the external skin, but in between the skin was perfectly normal.

Q. You were rendering relief for emergency work at that time? A. I was rendering relief for emergency work at that time.

563 Q. You were particularly concerned with keeping the man alive, weren't you? A. Making him as comfortable as possible; yes.

Q. You examined him, and did you find that his sight was gone? A. His eyes were badly injured; I couldn't do very much for his eyes at the time.

By the Court:

Q. As matter of fact were the eyeballs removed in the hospital, or were they gone at the time? A. It was almost impossible for me to open his lids that day. When he began to react he simply kept his eyes down, and I got a little dirt out from under each one of them, and put on a gauze bandage over both eyes.

564 Q. Do you know, as matter of fact, whether they did remove the eyes in the hospital? A. I know nothing about that.

By Mr. O'Neill:

Q. Then you looked him over and found that one of his legs was fractured? A. Yes, sir.

Q. And only one? A. That is my recollection.

Q. Would you be surprised to know that your examination was so careful that not only was one leg badly fractured, but both bones of the other

leg were also fractured? A. Some of the dressings I did not remove on his legs. 565

Q. Such a little thing as both bones of the fractured leg you might have overlooked while you were looking for the burns? A. That I fixed, myself.

Q. Do you see any burned marks on this man's hands (referring to Znicet Strimaitis)? A. It is barely possible that he has a burn here (indicating his left hand).

Q. You didn't see anything there to indicate that his hands were so badly burned that he was in the hospital 3 weeks with the burns? A. This is a burn here, a roughened surface. 566

Q. But to look at it you could never tell that that man's hands were burned and that he was in the hospital 3 weeks? A. The derma was not involved in that case (referring to the right hand).

ANICET STRIMAITIS, recalled.

By Mr. O'Neill:

Q. Were your hands burned by gas in a mine?

A. Yes, sir.

Q. How long ago? A. It was in 1902.

Q. For how long were you in the hospital from these burns? A. Three weeks. 567

Q. At the end of 2 years was there any mark of the burns left at all? A. Well, hardly.

Q. No more at the end of 2 years than there are now? A. No, it is about the same.

Witness shows his hands to the jury.

Q. Is it a fact that when your hands are burned if you are careful of the scar and scabs and don't pick them that the skin comes back in a normal way all right? A. That is what I was told; I didn't remove any.

568

Q. You took good care of your hands and didn't remove any of the scabs? A. I was told to do so.

Q. Your hands came along without scar? A. Yes, sir.

Dr. LAKE recalled:

By the Court:

Q. Which leg did you refer to that you say you attended to the fracture? A. I think it was the right leg; the 2 legs had been fixed up, but the man's condition was one of shock and I paid more attention to the effects of the shock.

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Q. But one of the legs you fixed up? A. One of the legs I fixed up.

Q. Did you rebind it, or reset it? A. We reduced the fracture; first aid men are not doing that; I reduced the fracture of the right leg.

CLARENCE FINE, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. Thomsen:

Q. Where do you live? A. Plymouth.

Q. What State? A. Pennsylvania.

Q. What is your business? A. Blacksmith now.

570

Q. Were you working in the Pettibone Mine in July, 1911? A. I was.

Q. In what capacity? A. As a miner.

Q. Were you a certified miner at that time? A. I was.

Q. How long have you been such? A. Since 1888.

Q. You were a coal miner from 1888 up to what time? A. I was a coal miner in the neighborhood of 15 years at that time.

Q. Then you were the coal miner who was work-

ing near the working place of the plaintiff Yurkonis on the day he was injured? A. The next place.

571

Q. Was there any other coal miner as near to him as you were? A. None.

Q. Go on and tell the jury in your own way just what you know about the accident to Yurkonis; what you were at prior to the accident and what you did afterwards? A. We were taking up a piece of bottom rock ready to put it in our road to the mine; and it is customary in the next place to send his laborer around to notify the opposite miner that he is going to fire, before he fires. And while we were working in there the laborer came around and hollered fire, but before we got out of there the shot went off, away from our place, and we run out and we went back; we met the laborer coming down from the place; he said he hadn't gone up, but his miner was hollering for help; the three of us went up together.

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Q. Who were with you? A. John—I can't repeat his last name, but my laborer was Joe McSavage, and John Sabal; they were my laborers, and Yurkonis's laborer and myself, we went up through behind the brattices, and when we got up behind the—beyond, the canvas was down; it was customary to have that up at the end of the brattices; and we went in and I took the safety lamp, we had no naked light with us at that time, and tested to see that everything was all right at the place where we were, right in the middle of the heading, and we found no gas, and we went down through the heading and found Yurkonis climbing up over the coal, with one shoe off his foot. So we got hold of him and pulled him up to the mouth of the place, and put him on a piece of canvas and carried him out and waited for the stretcher.

573

Q. Is there anything further that you did? A. Nothing particular, except that we found his safety

574 lamp laying near where he was; that was down in the heading.

Q. Was it lighted? A. No, it was not.

Q. After you carried him out on the canvas, as you have stated, what did you do? A. We waited until the stretcher came and put him on it and took him outside.

Q. You helped carry him outside? A. Yes, sir.

Q. Then what did you do? A. Well, I assisted all I could to help dress him until the doctor got there.

Q. What time of day did this accident occur?

A. Some time in the afternoon; I think it was between 2 and 4.

575

Q. You say between 2 and 4? A. Yes, sir.

Q. In the afternoon? A. Yes, sir.

Q. Did you hear this blast that went off? A. I heard the shot.

Q. You started immediately for Yurkonis's chamber? A. Yes; as soon as the shot went off.

Q. How long did it take you to get in there?

A. Not more than a minute and a half or two minutes.

Q. How long was it after Yurkonis's laborer warned you by saying "Fire"? A. Just as soon as he hollered "Fire."

576

Q. How long was it before you heard the explosion after that? A. Almost as soon as he hollered.

Q. About how many feet of the way had you traveled to Yurkonis's place, his working place, from where you stood when you heard the cry of fire? A. Well, it was 120 feet, about.

Q. Did you go immediately there? A. Right away.

Q. Did you notice at all the brattice near the entrance of the working place of Yurkonis? A. Oh yes, I did; I took particular notice of that.

Q. When did you notice that? A. At different times when I was going through there. 577

Q. Had you seen it before that? A. Oh, yes; I was through there 3 or 4 times a day; back and forth.

Q. How long had you been doing that? A. From the time I first went in there.

Q. Will you describe that brattice as to where it stood in relation to the brattice of Yurkonis's chamber or working place? A. The brattice was up, almost up to the corner, if not to the corner of the heading. That is, the outside heading. Then there was a canvas extended all the way up in front on the end of the brattice. 578

Q. How far was the wooden brattice from the corner of Yurkonis's working place? A. Up in the edge of the heading.

Q. When you went in there first you say you found the canvas was down? A. Yes.

Q. What shape was it? A. Laying in a heap back by the heading.

Q. Was one end of it fast to Yurkonis's brattice? A. Yes.

Q. And then it lay down on the ground? A. It lay down.

Q. You heard the plaintiff's testimony in relation to the way he lighted his touch paper? A. Yes. 579

Q. Were you present in Court when he was testifying? A. I was.

Q. Will you describe, so far as you know from your mining experience, what the usual practice is in firing a shot? A. You drill the hole and then take your powder and use a needle in that place, insert the needle in the place, and put the powder in it and back the end of the hole, use dirt for tamping and tamp up the hole, and then you pull the needle out and insert your squib and you use the

580 touch paper to set off the squib, so that the flame of the light won't come in contact with the passage of gas from the rib, wherever it is coming from.

Q. What would be done in case you lighted the squib? A. As soon as you light it you leave it; get out of the way of it; you only have about 2 minutes to get out of the way.

Q. Suppose you leave after lighting a squib and go outside the working place, and wait and no explosion occurs. What do you do then?

581 The Court: He may say if the explosion does not occur whether they go out of the mine, or whether they wait or go back, or what they do. He may answer that.

Exception.

A. Well, he wouldn't dare go back and fire the hole the second time; according to the rules of the mines and the law he wouldn't dare.

By the Court:

Q. What do you do? Stop working for the day?
A. You are supposed to leave your place and bar it off if a shot misses.

Exception.

582 By Mr. Thomsen:

Q. You say you found the lamp of Yurkonis?

A. The safety lamp and the shoe.

Q. Was his cap there, or did you find it? A. No, I don't remember finding the cap; I picked up the lamp and the shoe was down below.

Q. You found the safety lamp and the shoe? A. Yes, sir; I think we found the shoe first down inside of the heading.

Q. You say when you went through the brattice into Yurkonis's working place after the shot was fired, you made a test for gas? A. Yes, sir.

Q. Explain how you did that? A. By raising the safety lamp up to the roof; we always test at

the highest point of the place, wherever the gas would lead to. 583

Q. Did you find gas? A. No, there was no gas at that time.

Q. There was no gas in the chamber at that time? A. No.

Q. Could you tell whether or not there was any after damp? Is that what they call it? A. Not from the blast; there was no after damp there.

Q. Could you tell when you entered the chamber? A. Oh, yes.

Q. If there had been a gas explosion in that chamber just prior to your entrance could you have told it? A. Oh, yes. You could smell the gas. 584

Q. What is that called? Is there a name for it? A. It would be after damp if it was by itself in a large body.

Q. Did you notice any after damp when you went back? A. No, none whatever.

Q. Where did you get the canvas on which you carried Yurkonis out of the chamber? A. At the end of the brattice.

Q. At the end of the brattice which was at his working place? A. Yes; the piece that was laying down.

Q. How long was that, about? A. It was supposed to be from 10 to 16 feet long. 585

Q. And that was the canvas which you said was attached to the brattice? A. Which was attached to the brattice.

Q. And you took it off? A. Yes.

Q. And used it to carry him away on? A. To lay him down on.

Q. Did you give its length? A. From 10 to 16 feet. We doubled it up when we took it off.

Q. In fastening a canvas like that from the end of the brattice up into the roof of the mine, who does that? A. The miner or laborer can do that,

586 or the brattice-man. If the brattice-man puts up the canvas he uses what we call a miner's starter to drill a hole.

Q. Assume that it is up when you are about to fire a shot. What do you do? A. You take it down so that it don't get knocked full of holes.

Cross examined by Mr. O'Neill:

Q. Do you still work for this company? A. I do.

Q. In what capacity? A. As blacksmith.

Q. How long have you been a blacksmith for them? A. Two years last November; a year last November; going on two years now.

587 Q. Have you talked over this case with anybody? A. Not in particular; no.

Q. Did you talk it over with any lawyer? A. No; nothing more than what we met here.

Q. Did you talk it over with any lawyer here, or any other place? A. At home I made a statement of what I saw.

Q. When did you make a statement? A. I made a statement at the time of the accident.

Q. Then were you brought down to the company's office? A. Yes.

Q. And all the other witnesses were there? A. I suppose so.

588 Q. Well, you know; you were there? A. Yes.

Q. You saw them there? A. Some of them.

Q. Who else was there representing the company? Some lawyer or claim agent? A. Their own lawyer was there; the company's lawyer.

Q. And the witnesses all went over the matter together before you came here to New York? A. We didn't go over it together.

Q. You were all there talking about it, each listening to what the others were going to say? A. Oh, no.

Q. You told what you knew in front of the

others? A. Yes; but I didn't hear what the others told. 589

Q. Did you drive the first, second, third and fourth cross cuts from your working place? A. No.

Q. Which was the first cross cut you went to work on? A. The sixth.

Q. You had nothing to do with the first, second, third or fourth? A. No.

Q. As matter of fact you weren't driving the cross cut at all, at the time? A. I was starting in that direction.

Q. You were driving out east? A. I was at the boundary line at the time. 590

Q. Do you know how long Yurkonis had been driving the sixth cross cut from the other working place? A. No, I couldn't tell exactly.

Q. Did you know that it was 75 feet from the fifth cross cut to the sixth cross cut, to Yurkonis' working place? A. I did not.

Q. Do you know that 75 feet would be too long? A. 60 feet or 65, 60 feet of a pillar.

Q. You didn't know that this happened to be too long a distance? A. I didn't think it was.

By the Court:

Q. Where do you get the material for brattices? A. It is sent in by the company. 591

Q. In what form does it come? A. In 8 and 16 foot lengths.

Q. How wide are these straps? A. An inch.

Q. And how long? A. They run from 6 to 12 inches; we call them 6 and 12 inch boards, or 8 inch boards.

Q. 6 or 8 or 12 inch by 1 inch by 16 feet? A. Yes.

Q. Do you saw them off? A. Sometimes; not as a general thing, in putting up an extra brattice; we generally put them in in 10 or 16 foot lengths.

592 Q. Where you use the 16-foot lengths you would use 4 sections or lengths to make those brattices?
A. Yes.

By Mr. O'Neill:

Q. And then if the distance from one cross cut to the other happens to be 75 feet that of course would allow for 11 feet from the last length of brattice, wouldn't it? A. To the face of the line; yes.

By the Court:

593 Q. How do you make the diagonal part, the place that, on your side, was loosened by a door, from the face of the brattice in to the pillar how do you make that short section? A. It comes from the lower point of the rib; it comes out as far as you can go to the road, and then it comes up into the place.

Q. Do you take 16-foot lengths and put them in—look at the one behind you (referring to model made for illustration)? A. They are tapered off from here to the corner of the ribs with the 16 or 6-foot lengths, according to what boards we are using.

By Mr. O'Neill:

594 Q. This brattice that was in Yurkonis' chamber between the 5th and 6th cross cuts or headings, was that built in the usual way? A. From the 5th to the 6th? Yes, it was put up in the usual way.

Q. If it was built in the usual way why did you take particular notice of it before this accident?
A. Why wouldn't I, going through there every day.

Q. But why? If a thing is built in the usual way and it is an everyday thing to see it, why did you take particular notice of it? A. I don't know, unless my habit of watching things.

Q. Did you take particular notice of it? You didn't know anything was going on, that anything was going to happen? A. I knew something had happened then. 595

Q. But that wouldn't make you take any particular notice of it days ahead of time, would it? A. I didn't say days ahead of time.

Q. You said on direct examination, as you walked through there before the accident you took particular notice of it? A. From the place where I got the directions.

Q. Did you take particular notice of the brattice in Yurkonis' chamber before the accident? A. Nothing more than it was a brattice in front of me when I was going through. 596

Q. You didn't say "particular notice?" A. I didn't say "particular notice."

Q. If you did say it, you are mistaken, aren't you? A. I can't say I am mistaken.

Mr. Thomsen: The stenographer is asked to read the question and answer referred to.

The Court: He said he went right around there at the time of the accident, and that he took particular notice of the end of the brattice; that he had seen it many times before, and had passed there and had seen it every time he went through. It is for the jury to say whether particular notice was at the time of the accident, or whether he meant that he had taken particular notice before. 597

Q. Did you pay particular attention to it before the accident? A. Certainly.

Q. You did. Now you say it again. What proportion, or what part of the distance between the 5th and 6th cross cuts did the brattice run? A. It run up near the face of Yurkonis' place.

Q. But the whole distance was 75 feet; what

598 part of the distance was it? What part of the distance did it run? Sixty or 75 feet? A. It was 75 feet in to the pillar.

Q. How much of the distance did the brattice run? A. About 70 feet.

Q. So at all events it didn't come within 5 feet of the edge of the cross cut; that is correct, isn't it? A. Not if the pillar was 60 feet; the heading was from 10 to 12 feet wide.

Q. It has been shown here by diagram and admitted—

The Court: The pillar is over 70 feet.

599 Q. Over 70 feet from the easterly wall of the 5th cross cut to the westerly wall of the 6th cross cut was over 70 feet? A. Then it would run over 70 feet.

Q. The brattice didn't run up, according to your own testimony— A. Up near the corner of the heading.

Q. It run almost up to the end? A. Yes; that meaning the end of the pillar.

Q. But it didn't run up to the end? A. Within a short distance.

Q. Was that distance 5 feet? A. No, it was less than 5 feet; I am positive.

600 Q. Was it 4 feet? A. I didn't measure it.

Q. Was it about 4 feet? A. It may be 4, or may be less.

Q. You know, don't you, that it should have run up to the edge, and had been turned in for a short distance? A. I couldn't say that it was.

Q. You know that it wasn't in evidence, don't you? A. Only that the air had been turned in there by a canvas.

Q. That canvas you say you saw there after the accident? A. Yes.

Q. Have you yourself seen gas light on the side,

or near the ceiling when there would be no explosion? A. Well, there is always an explosion when the gas goes off; it explodes if it is ignited.

601

Q. If there is a small amount of gas, can't it light without there being an explosion? A. It can be lit so you don't notice it at any distance, of course.

Q. But can't it light so that there is no explosion, that is, a small amount of gas? A. How could it light without an explosion?

Q. I don't know. Mr. Davis says so. I ask you again to think it over. Can gas on the side of a rib of coal, or in the room, light without an explosion? A. You can ignite it on the rib.

602

Q. Without an explosion? A. Well, I couldn't say without an explosion; because it ignites when it is lit.

Q. Well, the explosion, if you insist upon it, may be greater or less, in accordance with the amount of gas? A. Yes, it may be greater or less in accordance with the amount of gas that is lit.

Q. An explosion is caused by the sudden expansion of a quantity of gas in the proportion of 1 to 9? A. Yes.

Q. And when it lights it has a tendency to throw a man down, doesn't it? A. It will expand, yes.

603

Q. And it might throw a man down without burning him to any particular degree? A. No, he is apt to get out of the way if he knows about it; but if his head is in it when he lights it it would burn him in throwing him down.

Q. He goes down pretty quickly, doesn't he? A. He certainly does.

Q. You say you had nothing to do with the other cross cuts? A. No.

Redirect examination by Mr. Thomsen:

Q. What time did you go to work that day of

604 the accident? A. In the morning, about 10 minutes to 7 or a quarter to 7.

Q. Had you been in the mine working continuously up to the time of the accident? A. I had.

Q. Had you been drilling holes and shooting on your side? A. Yes, sir.

Q. How many shots had you made? A. We generally drill from 3 to 5 holes a day; and more in the bottom.

Q. Did you make during the day, where you were, any test for gas? A. Oh, yes, always make a test at every discharge.

605 Q. What do you say as to the air and ventilation in your side.

Objected to, on the ground that plaintiff has nothing to do with the air and ventilation in Fine's cross cut.

The Court: Objection sustained. He may state what he found as to the circulation of air through the chamber and into this brattice.

Mr. Thomsen: That is what I meant.

Q. What do you say as to the circulation of air from your chamber in towards Yurkonis's? A. I found no different conditions during the day.

606

By the Court:

Q. Is this circulation of air strong enough so that you feel as if the wind were blowing? A. Oh, yes, you can tell when the air stops.

Q. Then you mean up to the time of the accident there had been no stoppage of air, that you remember? A. No, no stoppage of air that I remember. None to my knowledge.

Q. Did you have a piece of canvas out in front of your brattice down to where you were working? A. No; we weren't driving a cross cut; the air in

my place came in on the right hand side so that it took the circle of the face down the other side.

607

JOHN SOBEL, being duly sworn and examined as a witness for the defendant, testifies through the interpreter, William E. Morris, who was also duly sworn:

By Mr. Oliver:

Q. Where do you live? A. In Luzerne, Pennsylvania.

Q. How far is that from the Pettibone Mines? A. About 15 minutes off; I never measured it; I can't tell.

608

Q. Do you remember the date that Matt Yurkonis was injured? A. Yes, I worked at that time for him.

Q. You were laborer for Matt? A. Yes.

Q. Will you tell us just what you know about the accident; what you did just before the firing of the blast and after it was over, etc.? Will you tell us just what you know about it? A. I saw when the fire caught him; he was working in the heading and he finished tamping the hole; after my miner told me to go in Mr. Fine's and tell him and fire him. Just I went out the other cross cut the fire occurred. After Matt fires he said, "Jack, come in and help me; the fire caught me." After, I went for Mr. Fine, and told him my miner caught fire, and I run over in the heading and lifted him. When we got there we saw him laying down in the coal; the blood was running from his head and his legs, and afterwards came in Mr. Fine and his laborer, Joe McSavage, and we took him to the road. After that a lot of men came and we carried him out to the shaft, and I don't know any more.

609

Q. Where were you when the fire went off? A.

610 I just got in the heading and the blast went off.

Q. Do you mean the blast, or the fire, went off? Which? A. I don't know; I didn't see; I wasn't there. I don't stay with a miner when he burns a lot of squibs. I run away first.

Q. Did you hear the blast go off? A. Yes.

Q. Where were you then? A. I went into Fine's place.

At this point Jo Ackalitis is sworn as interpreter and continues the interpreting.

The Court: Ask the witness to repeat the statement as to just what he did.

611 Interpreter asks witness, and interprets as follows:

A. I went out to notify the other miner that he was going to fire. It was tamped in the hole and I went out to notify the other miner that he was going to fire. I was in another heading when the shot went off.

Q. You had gotten through No. 5 cross cut and over into Fine's heading? A. I had gone through the second heading.

Q. Were you where you could see Mr. Fine? A. Yes.

612 Q. Had you yelled fire, or anything? A. No, I hadn't time to holler out fire.

Q. Had you said anything to Mr. Fine? A. I had not; after the fire went out I knew that he was caught in the fire, so I told the other man to come over to help him.

Q. Was there a brattice in the chamber in which you and Yurkonis were working? A. Yes.

Q. There was a brattice? A. Yes, there was a brattice and there is a piece of canvas.

Q. Where did the canvas go? A. Right at the heading.

Q. How far into the heading did the canvas go? A. Oh, about 10 feet, I think.

Q. The canvas went into the heading 10 feet? 613
A. Yes.

Q. Was the canvas fastened to the wooden brattice in the chamber? A. Yes.

Q. Then went up and into the heading? A. Yes.

Q. And went 10 feet into the heading? A. Yes.

Q. Was that the way the wooden brattice and the canvas heading was? A. Yes.

Q. Just before you went over to tell Fine?
A. Yes.

Q. Is that the way it was all day? A. Yes.

Q. How many explosions did you hear after you went over to tell Fine? A. I heard only one. 614

Cross examined by Mr. O'Neill:

Q. Do you still work for the Company? A. Yes.

Q. What job have you got now? A. I am working for a miner.

Q. You have got the same kind of a job as you had at the time Yurkonis was hurt, or a different job? A. The same kind; but another man. The same kind of a job as Yurkonis got.

Q. Are you a miner now? A. Yes, I am a miner now.

Q. You get about twice as much pay as you did before? A. Oh, sometimes, and sometimes not. 615

Q. Did you sign a statement for the company a short time after the accident? A. Yes, I did.

Q. Was this the last cross cut? A. Yes, this was the last cross cut.

Q. The wooden brattice in Yurkonis's chamber between the 5th and 6th cross cuts didn't go all the way up to the cross cut, did it? A. Yes, it was up.

Q. Did it go up all the distance? A. The

616 wooden one was up about 60 feet from the 5th heading.

Q. And that left about 15 feet more of this distance between the 5th and 6th cross cuts, where there was no wooden brattice; isn't that right? A. Oh, no; the brattice was always in the heading; they couldn't put the wooden brattice in; it was a canvas; the miner takes the canvas out; if there was a wooden brattice in the heading when a miner is firing he takes it out.

Q. Mr. Davis, the head superintendent, has said, and a map has been offered in evidence to show, that the distance between the 5th and 6th cross cuts was over 70 feet? A. They ain't allowed to drive no further than 60 feet—

Q. We know you are not allowed to drive more than 60 feet; you listen to me. It happens to be admitted in this case, and is proved by the head superintendent and by the blue print that, although it was not allowed, they did drive it over 70 feet. Now you may take that as a fact, and listen to me. A. No.

CLARENCE FINE, recalled:

By Mr. Thomsen:

618 Q. Did you hear any explosion after the helper warned you as you have testified? I mean after Yurkonis's helper told you he was going to fire? A. I didn't hear no explosion after the shot went off; he hollered fire.

Q. Did you hear an explosion when the shot went off? A. No, nothing more than the discharge of the shot.

Q. That is what I mean. How many explosions did you hear about that time? A. Only one; I heard the shot going off.

Q. Was that all you heard? A. That was all I heard. 619

Q. Did you feel any concussion from that shot? A. No.

Q. Did you feel any concussion before or after the shot? A. No.

By the Court:

Q. He says he didn't get to the point where he could call you. A. He was at the heading.

Q. But are you certain he did call you? A. I am certain that he hollered fire, or else he hollered something when he went out; but he hollered fire and the explosion went off, because we started right back. That was the reason we knew there was something that had happened, because they were so close together. 620

JO MIKEWICZ, being duly sworn and examined as a witness for the defendant, testifies through the interpreter:

By Mr. Oliver:

Q. Where do you live? A. In Luzerne, Pennsylvania.

Q. How far from the Pettibone Mine do you live? A. It ain't very far; about ten minutes' walk. 621

Q. Were you working at the Pettibone Colliery at the time that Yurkonis was hurt? A. Yes.

Q. At what were you working? A. I was loading coal for Fine.

Q. That is, you were laborer for Fine? A. Yes.

Q. On the day that Matt got hurt were you in his working place or chamber before he got hurt? A. No, sir.

Q. Did you go in after he was hurt? A. Yes, sir.

622 Q. Go on and state what you know happened just about the time he was hurt; describe it; what you know and saw and did. A. I was staying with Fine, and the laborer came to the heading and he said right away fire, and the shot went off.

Q. What did you do then? A. We both went to the other side; Fine took the safe lamp to see if there was any gas, and there was no gas, and then they took our Yurkonis; and they took down the canvas and put him on the canvas, and I don't know what else.

Q. How many shots or explosions did you hear? A. Just one.

623 Cross examined by Mr. O'Neill:

Q. Do you still work for the company? A. Yes, sir.

WILLIAM F. POWELL, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. Thomsen:

Q. Where do you live? A. In Dorranceton, Pennsylvania.

Q. What is your business? A. Mine foreman.

624 Q. How long have you been in that business? A. About 12 years.

Q. Who pays you for that when you work? A. The D., L. & W. R. R. Co.

Q. That is, you are employed by the D., L. & W.? A. Yes.

Q. In what particular locality? Have you got a district? A. In the Pettibone Colliery.

Q. You are mine foreman there? A. Yes, sir.

Q. And have been for how long? A. I have been for three years; and this last time I was there for about three years, and on the previous occasion.

Q. You have been their mine foreman, and have been in that position in the Pettibone Mine for the three years last past? A. Yes, sir. 625

Q. Before you were mine foreman what were you? A. I was assistant mine foreman.

Q. And prior to that? A. I did general work; all kinds of work, all through the mine.

Q. Are you what is called a certified mine foreman? A. Yes.

Q. On the sixth of July, 1911, do you recollect that date? A. Yes, sir.

Q. Were you there on that day? A. I was.

Q. From what time to what time? A. I was there from about 6:30 in the morning till probably 5:15 in the evening. 626

Q. Do you know how many miners, laborers, all kinds of employes, were working in the Pettibone Mine on that day? A. I am not positive, but in the neighborhood of 250.

Q. How many levels has that mine got? A. Seven.

Q. Did it have seven then? A. Yes, sir.

Q. Tell the jury what you mean by levels. A. It is the different seams of coal going from the surface down into the ground; very similar to a hotel building, with different stories, except that between the seams of coal are seams of rock of various thicknesses; not all uniform. 627

Q. Now illustrate that. The shaft is something like an elevator shaft in a building? A. Yes, sir, very similar.

Q. And the chambers are like the spaces between the floors in a building? A. The faces of coal are like the spaces between the floors of the building, and the rock and dirt are like the floors of the building? A. Yes.

Q. Lying in strata between the coal strata? A. Yes.

628 Q. Explain the way the different levels are ventilated? I mean in the Pettibone mine, and how they were ventilated that day? A. All the different levels?

Q. Yes; the system of ventilating the levels in the mine. A. Each level has what we call a different split or a separate split of air, or air current, traveling through the entire work of that seam; the air comes from the main shaft; fresh air goes into the different levels and travels through the different faces and returns through an up-cast shaft or outlet back to the surface, or fan; the ventilating apparatus.

629 Q. How is that split of air made so that each level gets part of it? A. There are what we call regulators built at the return end of each one of those air currents, so arranged that the required amount of air or as much more air as you want can be circulating through the entire seam.

By the Court:

Q. Isn't the substance of the whole thing that if the currents of air are set in motion by suction that you can practically pull the air from as many levels as you connect through the suction apparatus? A. You can pull any amount of air that you want from each level, or all the levels.

630 Q. If you were forcing the air into the level you would have to explain how the air was brought into the level, but as you only pull it out it is only a question of having that suck the air from that level? A. Yes; but the currents have to be broken—

The Court: We are not interested in that.

The Witness: Well, that is the idea.

Q. It doesn't make any difference how you shut

off air or how you work, or the details; the method is that the fan draws the air through the level and you ventilate? A. Yes, sir. 681

By Mr. Thomsen:

Q. What level was the plaintiff working at? A. In what was known as the 5-foot vein level.

Q. How many coal miners were working on that level that day? A. There were probably 48 men all told.

Q. What do you mean by "all told?" A. Because there are all the miners, laborers, and some drivers, car runners and door tenders and masons, brattice men. 682

Q. How many certified coal miners were working on that level that day? A. I would say there were about 20 or 22 probably; I don't now exactly.

Q. From where the split of fresh air entered the level where the plaintiff worked to the place where he worked what was the distance, approximately, if you know? A. Well, about 14 to 16 hundred feet from the main shaft.

Q. Was that where the split was made? A. That was where the split was made, yes, sir.

Q. From the place where the plaintiff worked on that day to where the air left that level what was the distance, approximately? A. To where it returned? 683

Q. Where it leaves the level. A. Well, about 2,200 feet, I should say.

Q. Were you in charge of the mine that day? A. I was.

Q. Were you in the shanty in the morning when the plaintiff came to work? A. Well, I don't recall that I saw him; I probably was there though; I generally get there about half-past six.

Q. Then you don't recall whether you were there

634 then? A. I don't recall whether—I don't recall seeing him, but I was there on duty that day.

Q. Did he that day have any conversation with you? A. Not that I can recall; I don't remember any such thing.

By the Court:

Q. Do you know from your records whether any of the men were prevented from going to work? A. They were not, no, sir.

By Mr. Thomsen:

635 Q. Do you remember having any conversation with the plaintiff within a week or ten days prior to the day he was injured? A. I was in his place in that time; I have talked to him—

Q. Did you talk to him prior to that time? A. Yes, sir.

Q. Well, when? A. The day before; I was in his place talking to him.

Q. On any other occasion? A. That is about the only place that I would see him to talk with him.

Q. Previous to that occasion? A. Well, I go through those places about every alternate day, and see them and direct them.

636 Q. You mean as mine foreman you enter that mine and go through those chambers and levels and into the working places of the miners? A. Yes; at least every alternate day.

Q. On any of those occasions when you went in the working place of the plaintiff, or at any time when you were with him, did he have any conversation with you, or refer to the brattice which entered his chamber or stood near it? A. No, sir; not that I recall.

Q. Did you hear the plaintiff's testimony on the witness stand? A. Yes, sir.

Q. Did you hear him relate a conversation which he claimed to have had? A. I did. 637

Q. With you or in your presence? A. Yes, sir.

Q. Did that conversation occur? A. I don't recall any such conversation at all.

Q. It might have occurred and you have forgotten it? A. I don't think so.

Q. What particular official of the mine has the duty of having anything to do with where these cross cuts are made?

Objected to as to form. The question is who does it.

Q. Well, who do it? When you carry on the work of the mine who has anything to do with the work? A. I take those measurements myself, or direct my assistant to do so. 638

Q. Who is your assistant? A. John S. Davis.

Q. Was he your assistant during this period? A. He was.

Q. Then the marking off and measuring and directing of where the crosscuts should be made in the chamber off from the chamber on the level in the spot where the plaintiff worked on the day he was injured you say you had charge of that day? A. I do; I did.

Q. Can you give us the measurements of those crosscuts in that particular chamber? A. Seventy-two feet of solid pillar between the fifth and sixth crosscuts. 639

Q. That is between the fifth and sixth crosscuts? A. Yes.

Q. And the plaintiff was working in the sixth? A. Yes, sir.

Q. How about between the 5th and 4th? A. Not quite so much.

Q. Well, how much was it? A. Well, 60 feet of solid pillar there.

640 Q. And between the 4th and 3rd? A. About the same.

Q. And between the 3rd and 2nd? A. About the same thing.

Q. And between the 2nd and 1st? A. Yes, sir, about the same.

Q. And between the first and the gangway? A. That was about the same.

Q. Then there were, you think, about 60 feet? A. Yes.

Q. Except the space between the 5th and 6th, and that, you say, was 72 feet? A. Yes, sir.

641 Q. You say you ordered that cut there? A. Yes, sir.

Q. Will you explain why you ordered a cut made 72 feet between the 5th and 6th crosscuts? A. Well, there wasn't room or at least by directing this 72 feet, making a cut there would move away the easterly end of the cut along our barrier pillar, or property line; and back there wouldn't be room to drive two crosscuts through there; and this one would be extra wide, but the main crosscut along the barrier pillar where the return air would come back from that split afterwards; at least, it was going in that direction. That particular crosscut was 12 feet wide.

642 By the Court:

Q. It was 84 feet from the far side of the 5th crosscut to your property line? A. Yes, sir.

Q. Was it 84 feet in both your corner gangway and in Fine's chamber? A. Yes, sir.

Q. So that the crosscuts were parallel to the property? A. Yes.

Q. Then if you made a cut 60 feet from the 5th crosscut and made the cut 12 feet wide that would use up 72 feet so it would bring it just to the edge of where this crosscut was started? A. Yes.

Q. And would leave you 12 feet of coal at the other side of the crosscut? A. Yes, sir. 643

Q. Then the fact was that you put the crosscut just its own width on beyond where it would ordinarily have come; 12 feet? A. Yes.

Q. Will you explain to the jury if there is anything to be explained about cutting that last crosscut on the property line so far as it will affect the ventilation of that level? A. That last crosscut being cut through—at least, the distance being increased between the 2 crosscuts was for the purpose of taking the coal up in a straight line to keep our line straight the whole length of the barrier pillar or property. If we had taken the full width out and driven the crosscut to 60 feet and then taken from there to the barrier pillar out we would have had an extremely wide place. We moved the crosscut in in order to keep our ventilation in a straight line. 644

Q. In other words, if you went on beyond the last cross to extend the chamber a distance beyond where there was going to be cut the crosscut at the end of it it leaves a pocket there? A. Yes, sir.

Q. So you would have to continue to ventilate that as long as you would mine? A. Yes, sir, because we have to have ventilation traveling through all parts of the mine or gas would generate; it would be dangerous. 645

Q. How often did you say you visited this chamber where Yurkonis worked? A. I made it a rule to visit all the working places at least 3 times a week.

Q. When were you down there last prior to the accident? A. Well, I can't recall whether I was there that morning or the day before; but either one or the other.

Q. Did you notice at all the wooden partition

646 which enclosed or was put up in crosscut No. 4?
A. Yes, sir.

Q. What was its condition as you saw it on that occasion? A. Its condition was good.

Q. Describe it to the jury. Describe its construction? A. We would take and stand 2 vertical props about—we will say 18 inches from each side, each rib; that we cut the boards to fit as near as we can across the entire opening, and they are nailed fast and then patched around the ends with small pieces of board. That is, props are nailed, secured there.

647 By the Foreman:

Q. About what size are those props? A. Probably 6 inches in diameter, about.

Q. Six inches? A. Well, they are round props; 6 inches in diameter.

Seventh Juror: Regular fence posts?

The Witness: Yes, sir.

By Mr. Thomsen:

Q. How about the joints on the sides of the coal M? A. That is what I just explained; they are patched around those ragged edges of the coal with small pieces of board.

648 Q. Is that presumed to be made air-tight? A. Oh no; it isn't necessary.

Q. Why do they put them of the wood in the chamber back of the last crosscut? Why do they put a wooden partition in the crosscut just behind the last open crosscut? A. We always maintain in good mining that it is good policy to have at least one crosscut open next to the face; and the crosscut is never permanently stopped until the next one ahead has been driven, and the reason we have the second crosscut back from the face stopped up temporarily is for several reasons; the face cross-

cut might cave, or there might come a cave in the face of the chamber advancing to the next one, and the ventilation would be stopped up; and the place would become dangerous, in a dangerous condition from explosive gases. If the next crosscut behind were permanently air-tight it would stop the ventilation for the whole system; it would be a very dangerous condition; and another reason is that we might possibly have a mine fire in one of those places that the crosscut leads from or to; and if we had permanent walls in back it would take some time to get those walls out and there would be another very dangerous condition, so we simply stop it up with the boards or plank until the next advancing crosscut is driven, and then it is closed permanently with stone or cement and sand and lime. 649

Q. In the process of coal mining in the vicinity of a wooden partition like the one you have described, is it subject at all to any damage from the explosion of blasts? A. Oh, yes.

Q. Concussion? A. Yes, sir.

Q. Explain that to the jury. A. Well, if there is—if those partitions are just built of wood a very heavy explosion in powder, in blasting, particularly in small veins where the space is low, concussions from those shots may loosen those brattice boards; just as if you explode dynamite on this floor it would break all your windows. Those are recorded right along, every day; so their brattice man travels through the sections, and it is part of his duty to look after these different stoppings, which he does, and report them. 650

Q. Were there any other wooden structures in that chamber and working place aside from this one on the day of the accident? A. Yes, sir.

Q. What other wooden structure was there? A. We have this wooden brattice going from the 5th 651

652 crosscut towards the 6th in Yurkonis's and Fine's places.

Q. Anything else wooden, any wood in that chamber aside from what you have mentioned? A. No, sir.

Q. Any props to the ceiling? A. We carry props all through coal mines; about every 10 feet there is a prop.

Q. Are there any of wood? A. Oh, yes.

Q. Are there any planking above the props to sustain the ceiling of the mine? A. That is what we call mine timbers; we have two uprights and cross pieces.

653 Q. Who furnish that timber to the miners? A. The company, to the miners.

Q. Who puts in the props and the planking? A. The miners; each man does it for his own place in actual advancing, or mining; in the main roads, after the place has gone on we have these timber men or company men, and they are paid by the day.

Q. Take Yurkonis's chamber; any overhead props that were needed as he went along he would put in with company timber? A. Yes, sir; he would put them in and be paid for the labor.

654 Q. But he wouldn't build his own brattice and he wouldn't build the partitions across the cross-cut? A. No, sir, he would not; we would have company men for that.

Q. Will you describe the brattice which led to the chamber of the plaintiff on the last occasion when you saw it? A. The brattice which led from the 5th crosscut into the face of the chamber was in good ordinary condition; it was of boards like that piece going diagonally across there (indicating); there would be a prop stood right where that upright is on this screen and then a short length, depending on the way the timbers were driven. This particular one would be 8 feet from

that rib up in a diagonal course towards the face of the chamber; that is what we call a wing length. Then from there the boards would be nailed on in straight length, going up until the 6th chamber was reached. This wooden brattice on that day had extended on to the corner of the 6th chamber; in the corner of the 6th chamber we had a piece of canvas cloth; a piece of heavy duck canvas, extending diagonally down into that chamber, I should say 8 feet. That canvas was nailed—it was 16 feet long and would be nailed on the side of the board brattice or just hung there, or nailed mostly. On the last prop, extending diagonally down into this crosscut was fastened through little holes in the roof a wooden plug, put in there with a nail and the end of the canvas was hung on that nail. That was the condition of this brattice when I was there. 655

Q. Did you see anything on that occasion which you would say, as an expert miner and as a mine foreman, was out of order in any way? A. No, sir, nothing. 656

Q. And after your examination, made as you have described, you allowed the men to go to work? A. Yes, sir.

By the Court:

Q. Did you make a statutory examination before the men went to work that morning, yourself, or did somebody else? A. No, sir; my assistant, Mr. Davis. 657

Q. Were you down in that level before the explosion on this day of the accident? A. Well, I can't recall whether I was in that particular section that morning or not.

Q. As far as you remember you don't remember being there? A. I don't remember whether I was there or in some other part of the mine.

658 By Mr. Thomsen :

Q. After the accident to Yurkonis did you then go down into the chamber? A. Yes, sir.

Q. How soon afterwards? A. As to the time I wouldn't be positive; I remember being down in another vein when the accident occurred; word was sent to me; I went up and assisted in getting him out and dressing him with first aid treatment, and as soon as he was sent to the Moses Taylor Hospital I went back down to make an examination of this place and see what had happened.

Q. Did you want to find out what caused the accident? A. It was my duty to do so.

659 Q. Describe what you found on that trip? A. I found the place in just as good a condition as I have already explained, previous to the accident; in perfect condition; the brattice cloth extended down the chamber and there wasn't any particle of standing gas there at all.

Q. Do you say the brattice cloth was there after the explosion? A. When I reached that cross cut after the accident had happened the brattice cloth was hanging down across the corner of the cross cut.

660 Q. Did you hear the other witnesses say they used that cloth for a stretcher? A. They used it to carry him back to the mine stretcher; it wasn't taken more than 30 feet away from where the accident happened; till the man was put on the mine stretcher and covered with blankets and taken from that point, outside.

Q. Then what was done with the cloth?

Objected to, on the ground that the witness doesn't know.

Objection sustained; exception.

Q. Did you do any measuring of that cross cut

at any time after the accident? A. Yes, sir, right away. 661

Q. What were the dimensions? A. Twenty-one feet from the corner of the rib to the face of the cross cut.

Q. How wide? A. Twelve feet.

Cross examined by Mr. O'Neill:

Q. Who was the fire boss there? A. John S. Davis.

Q. When you got down there after the explosion the man had been carried how far? A. When I got back to the cross cut the man had already gone.

Q. You found this 16 foot brattice cloth in the 6th cross cut hanging up, in perfect condition? 662

A. I didn't say it was 16 feet long; I said I found the brattice cloth there, about 8 feet long.

Q. What length did you find it the day before? A. 16 feet.

Q. Didn't you say, "I found it in perfect condition, the same as I saw it the day before? A. I said I found it in perfect condition with the canvas extending down into the cross cut.

Q. Didn't you say you found it the same as you did the day before? A. Found what?

Q. The brattice cloth. A. The brattice cloth—I said I found it extending into the cross cut the same as I did the day before. 663

Q. Didn't you say you found it the same as you did the day before? A. Yes, I said that.

Q. Now, you remember that somebody says they cut off a part of it, so you have reduced the 16 feet to 8 feet, have you? A. No, sir, I did not.

Q. How much brattice cloth did you see after the accident? A. I said 8 feet.

Q. And you saw 16 feet the day before? A.

664 Our regular length; the canvas is cut a length of 16 feet.

Q. Are you sure that was what you said before? A. Yes, sir, I am sure that was what I said before.

Q. This heading from the 5th to the 6th cross cut you drove 72 feet? A. We didn't drive the heading 72 feet, no.

Q. Well, the chamber? A. It wasn't the chamber.

Q. What was it? A. It was what we call a lateral gangway, or a branch gangway off from the main—

665 Q. Mr. Davis has called it a chamber, and he says he has had 41 years' experience. Will you take his word for it? A. No, sir, I will not; it was a gangway. Mr. Davis—

Q. No. Just answer the questions. You knew you shouldn't drive it more than 60 feet? A. There is no law governing cross cuts between gangways; you can drive them 100 feet apart if you want, or 200 feet; there is no law governing the distance between cross cuts; that only applies to the depth—

Q. If Mr. Davis said it should only be 60 feet, and it was a violation of the mining laws, he was wrong? A. He was wrong; he made a mistake.

666 Q. Have you talked it over with him since? A. I have not, no sir.

Q. You heard him say it, didn't you? A. Yes, I heard him say it.

Q. But the usual distance is 60 feet? A. Only in chambers or breasts; not in gangway roads, no sir.

Q. Is that the usual distance, 60 feet? A. No, sir, not on gangway roads; it is in chambers or breasts.

Q. On this gangway road between the gangway

and the first cross cut it was 60 feet? A. Yes—I 067
wouldn't be positive about that.

Q. You did say it before? A. No;—I said
about the same.

Q. It was about 60 feet between the first and
second, and between the second and third, and
between the third and fourth and between the
fourth and fifth? A. Yes, sir.

Q. So it was the usual distance in that gang-
way too, wasn't it? A. It was what had been done
there—

By the Court:

Q. Do you call it a gangway when it is running
up against your property line so that it can't 668
go anywhere? A. Yes; it is a lateral or branch
gangway; the main gangway was driven through
the center of the property and these side lines
were driven off on the side.

Q. This was a side gangway? Side gangway to
your property line? A. Yes, sir.

Q. What is a chamber? A. They are turned
from the side gangway.

By Mr. O'Neill:

Q. What is a cross cut? A. A cross cut is an
opening made between two chambers or two
breasts or two gangways? 669

Q. Exactly. It is an opening between two cham-
bers, the same as Yurkonis' and Fine's chambers.
That is correct? A. Yes, certainly it is.

Q. So Yurkonis' working place, from which
these 6 crosscuts led, was a chamber, wasn't it? A.
No, it was a gangway.

Q. If you did have more space to your east
boundary line I suppose you would have contin-
ued the usual and customary 60 feet? A. Prob-
ably we would, yes, sir.

670 Q. Because it was 84 feet you continued the pillar 72 feet? A. Yes, sir.

Q. Instead of driving there 30 feet and then having a crosscut and then having a 7th crosscut out to your boundary line; is that correct? A. No, we never gave it a thought of doing anything of the kind; we didn't do that.

Q. You were willing to take a chance to disobey the law? A. We didn't disobey any law.

Q. At all events you know that you could very readily have driven 30 feet and then had a 12 foot gangway, and have a 12 foot gangway from the end and then 2 30-foot pillars? A. We didn't want that.

671

Q. That would be a waste of money? A. No, sir.

Q. It would be more expensive? A. No.

Q. It wouldn't be more expensive to drive an extra cross cut? A. No, sir.

By the Court:

Q. What were you doing with the coal that Yurkonis was taking out? A. We shipped that out in cars, the same as the coal in the gangways, and all coal in the mine.

672

Q. If you cut the two crosscuts you would get out more coal? A. Yes, sir; I thought you meant would Yurkonis reach more coal. We would get more coal out of the property; sure.

Q. Would it be in any sense robbing the pillar? A. Yes, by making a second opening through, by making our pillar smaller than we carry them.

Q. Then you wouldn't make your pillar less than 60 feet? A. No, sir.

Q. But you would make it more? A. In this particular case.

By Mr. O'Neill:

Q. Why would you make it more? A. I have already explained why we did it.

Q. Doesn't the length of the pillar have an effect upon the ventilation? A. To some extent. 673

Q. Isn't the longer the pillar the greater the strain upon the ventilation? A. Oh, no; not in that particular case. Not in any case.

Q. How many brattice men were down on that level? A. One.

Q. And how many brattice men were in the entire mine? A. At that time?

Q. Yes. A. Three.

Q. Which of them has charge of the others? A. Neither one; they all three rank alike.

Q. Jack Davis, as fire boss, in your absence, gives instructions to the miners and the brattice man? A. Jack Davis, in my absence, gives instructions to the brattice man and miners? 674

Q. Yes. A. Yes, sir.

Q. And he is the man to whom in your absence the men should make complaints or reports of any defects in conditions? A. He would be unless there was some other man sent there to take my place.

Q. But in your absence, unless that had occurred he would be the man to report to? A. Yes, sir.

Q. When these men report outside to the man in the morning they call out their number? A. Yes.

Q. And then they are told whether the place is all right? A. Yes, sir. 675

Q. And if the place is all right, then they go down in the mine? A. If the place is all right they go down in the mine.

Q. With a safety lamp? A. Yes, sir.

Q. And an open lamp? A. Yes, in some sections.

Q. If they are told there is no gas they go down with their open lamp? A. Yes, sir, if they are

676 working in an open lamp section; there are different sections where they work with open lamps and other sections they work exclusively with safety lamps.

Q. And if conditions are dangerous and the miner is allowed to go into the mine at all his open lamp is taken away from him? A. He is not allowed to go in if the condition is dangerous.

Q. If it is a closed lamp section he isn't allowed to go in with an open lamp? A. In no case; whether it is dangerous or not, he isn't allowed to.

Q. When was the 4th crosscut finished? A. Well, I don't know exactly when it was finished.

677 Q. Have you no records of that? A. Not here, I haven't; no.

Q. You didn't think that would be of any importance in this case? A. I didn't think; I didn't—

Q. Well, about how long before this accident was it finished? How many months? A. I would say may be two months; but I don't know; I couldn't give you a definite answer on that.

Q. So that for this period you had this 4th cross cut closed up temporarily with these boards? A. Yes, sir.

Q. And the blasting that goes on there every day tends to loosen these boards? A. Yes, sir.

678 Q. What is the object of closing the cross cuts with building material and cement? A. The cross cuts that are back?

Q. Yes? A. In order to carry the ventilation into the interior of the mine.

Q. To make them air-tight and to prevent the air from going through? A. In some cases they are air-tight, and in other cases would be about 2 inches diameter; in the top, to let some air go through there to keep that place clear of gas, and surrounding places clear.

Q. But the object of putting cement instead of planks is that it shall not affect the circulation and prevent the air from going through and being dissipated, back? A. It wouldn't be dissipated; it would be short-circuited and would reach the interior of the mining place. 079

Q. But for 2 months before the accident you maintained this temporary condition? A. Yes, sir.

Q. And you say you maintained that temporary condition because there might be a fall of roof or a mine fire which would make it necessary for the men to get out through that cross cut? A. No, it would make it necessary for the men to get out through there.

Q. Well, why did you maintain it with boards? A. I have already told you why. 080

Q. Well, tell it again. Why were there boards instead of cement? A. Because it was closed temporarily until the 6th cross cut was through; that would make 2 open cross cuts from the face.

Q. But why did you make the second cross cut from the face? A. The first might cave; close up; then, if the third cross cut from the face was closed up tight it would check all the air in that section; that would make a dangerous condition.

Q. Why did you have boards there during this 2 months, instead of a door? A. To check the air so that it wouldn't all travel through that cross cut. 081

Q. Why did you have boards there instead of a door? A. If we had a door there there would be all kinds of trouble; there would have had to be somebody there to take care of it all the time, and that would be jarred down, just as a brattice would if it was nailed up.

Q. The reason you didn't have a door would be because you would have to have the service of a man to attend to it? A. I don't say that.

682 Q. You have a door to stop the air at the main gangway? A. Yes, sir.

Q. And it does it effectually? A. Yes.

Q. And the only difference is that you have to have a man down there to attend the door? A. That isn't the only difference.

Q. I say did you have a man there to attend the door it would be a good ventilation system? A. No, sir, it would be a dumb one.

Q. It would short-circuit, would it? A. No, it would not short-circuit.

Q. It would continue on to its proper place? A. It does, without it.

683 Q. The dumb part would be that it would be expensive? A. No, not at all.

Q. It wouldn't even be expensive? A. I didn't say that; it would be an unnecessary and useless expense.

Q. It would be, then, expensive? A. I presume it would be expensive; mighty.

Q. Why won't you admit and stop argument? A. I am not arguing.

Q. How far did you say this Yurkonis' place was from the return upcast? A. About 2,200, feet, if I remember rightly.

Q. Do you maintain a colliery report book? A. Yes, sir.

684 Q. In that colliery report book do you enter the length of the pillars? A. No, sir.

Q. Do you enter the lengths of the headings at all? A. No, sir; only just go one month or one two-weeks to the next. We have a pocket memorandum to measure them, because the men are paid for it.

Q. Are they entered in a colliery report book? A. No.

Q. Have you got a colliery report book? A. Certainly; all kinds; if you mean here in our pay roll

books, I say yes, sir; that is where they are entered. 685

Q. Don't you know what is known as a colliery report book? A. Yes, sir.

Q. Do you enter in them the distance that you drive the pillars and headings? A. No, sir, that is not what it is for.

Q. You are sure of that, are you? A. Yes, sir.

Q. I will read you this from Section 15 and see if you ever heard this before: "The headings shall not be driven more than sixty feet from the face of each chamber or breast and shall be entered in the colliery report book." Did you ever hear that before? A. Yes, but read the rest of it. 686

Q. That is all there is. A. That pertains to the assistant mine foreman's examination in the mornings.

Q. You not only disagree with your head superintendent as to what constitutes a heading of a chamber, but you also disagree with the plain reading of this law? A. You read all the law all the way through and you can see a different meaning to it altogether.

Q. Read Section 15 all through and see if you can get any other meaning out of it than that? A. Here it is (reads):

"Section 15. The quantities of air in circulation shall be ascertained with an anemometer or other efficient instrument; such measurements shall be made by the inside foreman or his assistant once every week at the inlet and outlet airways, also at or near the face of each gangway and at the nearest cross-heading to the face of the inside and outside chamber or breast where men are employed, and the headings shall not be driven more than sixty (60) feet from the face of each chamber or breast and shall be entered in the colliery report book." 687

688 A. But not the distance.

Q. But not the distance of what? A. Of what that says. That doesn't say anything about distance. We have that report book here with us.

Q. You understand English when you read it, don't you? A. Yes, I understand English when I read it.

Q. Read it again? A. Oh, it isn't necessary.

Q. You don't want to read it? A. No.

Q. (reading): "Also at or near the face of each gangway"— A. But the first part of it is what is to be recorded.

689 Q. Is there anything that says that you shouldn't regard the last part of it? A. No, sir; or that you should either.

Q. Well (reading): "Also at or near the face of each gangway and at the nearest cross-heading to the face of the inside and outside chamber or breast where men are employed, and the headings shall not be driven more than sixty feet from the face of each chamber or breast and shall be entered in the colliery report book." Don't that say it must be entered in the colliery report book? A. No, I don't understand it that way.

By the Court:

690 Q. With reference to that particular language why doesn't that provide that the last crosscut shall be not more than sixty feet from the breast? A. Because we have never understood it that way; we have never made any records of distance.

By Mr. O'Neill:

Q. You had a superintendent who understood it all right? A. I am talking about what I understand. We have a report here, if that is our measurement record, according to our interpretation of the law.

Q. And with what you understood about it you undertake not only to contradict the plain language of this law, but to contradict your head superintendent? A. I am satisfied to contradict everybody, so I am right. 691

Q. You would contradict them no matter how much you are wrong. A. I didn't say so.

The Court: You are reading from the official copy?

Mr. O'Neill: Oh, yes, sir. This is the one in evidence. I am reading from the copy of the Anthracite Mining Laws of Pennsylvania, printed by Mr. C. E. Aughinbaugh, Printer to the State of Pennsylvania, from Art. X, Section 15 of the Anthracite Mining Laws of Pennsylvania, approved June 2nd, 1891. 692

The Court: Then the law reads reads that the quantity of air shall be ascertained, measurement shall be made by the inside foreman or his assistant every week, and that headings shall not be driven more than 60 feet from the face of each chamber or breast, and that then it goes on to say "and shall be entered in the colliery report book."

By the Court: 693

Q. How do you interpret that? A. To mean that the air measurements and their results be entered.

Q. What is the colliery report book? A. A book with forms in for filling out.

By Mr. O'Neill:

Q. You also construe it that that section permitted you to drive a distance from the 5th to the 6th crosscut of 120 feet if you wanted to? A. In gangway roads, or between gangway roads.

694 Q. Just give me an answer in this case? A. Yes, sir.

Q. That is the way you construe it? A. Yes, sir.

By the Court:

Q. You wouldn't call this 5th crosscut a heading? A. Your Honor, if I may explain that; the general calling and custom in the anthracite coal region is that in some places where the miners live in a particular locality they are called cross headings; and the men—

695 Q. But when Section 15 of the Statute uses the word "heading"— A. The main headings.

Q. It says "the headings shall not be driven"— A. Yes, sir, that would be a crosscut in that case.

Q. (reading): "the face of each chamber or breast would be what? A. I don't understand, your Honor.

Q. (reading): "The headings shall not be driven more than sixty feet from the face of each chamber or breast." A. I think that means that there can't be over 60 feet of solid pillar—only 60 feet, or not more than 60 feet, at least, between the headings or cross cuts between chambers or headings.

696 Q. Then wherever you have a chamber or a breast you must have a crosscut as close as 60 feet to the face of the breast? A. The face can't be driven 60 feet beyond the last cut without putting in another crosscut.

Q. By "the face" you mean the end of the gangway? A. The end of the gangway or chamber.

Q. What is the breast? A. The breast is the same thing; the face of a gangway or the face of the chamber would be the actual point of working.

Q. Then what is the difference between the main gangway and a lateral gangway, if you are driving that gangway? A. You take the main gang-

way and they are generally located in a particular plot; with reference to the plot they lay the ground; that is driven right on the long way of the property. 697

Q. When you are driving it isn't the part from which the coal is being taken a chamber or breast?

A. No, sir, it is a gangway; the main gangway is generally driven—well, that depends on the location of the colliery too; in some parts of the anthracite field they have to be driven wider than in others.

Q. When you are driving a lateral gangway why isn't the end of the gangway where the work is being done a chamber, or breast? A. If you are driving a gangway you are driving that with the idea of leading from your main gangway to your barrier pillar— 698

Q. In this case your coal chamber would be the crosscut? A. No, sir; the crosscut and chamber is—

Q. Where are you going to have any chamber outside of your own mine? A. Not outside; that will be driven from the main gangway to the barrier pillar in that solid coal.

Q. Well, what is the chamber then? All we know about is that Mr. Davis said that this lateral gangway would be called a chamber he understood? A. Well, if he said that he must have been mistaken. The lateral gangway is driven off from the main gangway to the barrier pillar, as near the lay of the ground to keep the road level as he can; and then the chamber or breasts are turned from that lateral gangway to mine off the coal. 699

Q. Where? A. Off this lateral gangway.

Q. Simply using this paper in evidence for the purpose of illustrating, Mr. Davis said that this black part was unmined coal, and assuming that your property line is at the end of this white ladder-

700 like representation where would you excavate? A. In the right and left of those two roads (indicating to the side of F gangway on Exhibit C for identification).

The representation has already been used to show that everything that is not indicated is coal.

By Mr. O'Neill:

701 Q. If you drove them north or south—if you drove them north of Yurkonis' gangway, as you call it, and south from Fine's gangway, as you call it, you would have to drive them into another gangway, wouldn't you? A. They would be on—

Q. Just answer the question. A. To the north and south, yes; to the south side, no.

Q. Why "no" on the south side? A. Because it would run into a rock fault.

Q. Then the chamber would be merely a cross-cut? A. I don't understand what you mean by that.

Q. The chamber driven to the north— A. Would be a chamber or breast.

Q. Which would be a crosscut. A. No; not as we use mine terms.

702 By the Court:

Q. If you drove it on the north would you meet another gangway? A. Yes, sir, we would drive another gangway to cut those chambers off, because after they are driven about 300 feet—

Q. Had it yet been driven? A. No, sir.

Q. Then you mean if you had excavated what you call chambers to the north that subsequently you would put another gangway in to turn those chambers into crosscuts? A. The coal would be mined and the idea would be to cut the road off,

because the road gets bad after you make a chamber through about 300 feet. 703

Q. How far to the north would you put your next gangway? A. From 300 to 400 feet.

Q. How far would you drive these chambers? A. That distance; 300 or 400 feet.

Q. And you would have to drive that chamber, then, in connection with another chamber so as to put crosscuts between the two? A. Yes, sir, they would be driven together.

Q. Then you would drive two chambers to the north with the crosscuts in between the two? A. Yes, sir; and those—

Q. Those two chambers that you would drive— when you drove them they would be just the same as Yurkonis' and Fine's; they would be chambers and not gangways? A. They would be chambers for the reason that there wouldn't be any other chambers off from them. 704

Q. Then you kept calling them gangways and didn't pay any attention to Section 15 until you got to the point where you were going to make the last set; and there you call them a chamber? A. No, sir.

Q. Where do you stop calling these places chambers, or where do you stop calling them gangways? A. They are called gangways when other working places or chambers are turned from them. 705

Q. Well, until you do turn away from them there aren't any other working places, or chambers, are there? The last one you are working has no other turned from it until you start a new one? A. I don't understand what you mean.

Q. If Yurkonis' and Fine's were the last ones that you were going to construct there it would be the last? A. Yes.

Q. And you would call it a chamber or a breast if you had been going to stop for any reason? A.

706 Oh, yes; if you were just going to drive those two places in they would be called chambers turned from the main gangway.

Q. And then you would have to keep the pillar with the crossings at 60 foot intervals? A. Yes.

Q. But if you were going on to open another chamber at a right angle to these, or in some other direction to these, then you would call it a chamber? A. No, sir.

Q. Don't you think you would get in difficulty with the laws of Pennsylvania over that? A. I don't know; we haven't yet.

707 The Court: I shall charge the jury that whether or not this making a mistake as to the interpretation of the statute doesn't make any difference, so far as this case is concerned, for we are not interested in whether Pennsylvania enforces its laws or not; but of course the jury could consider that in determining the present situation, and whether it increases the difficulty in ventilating the mine. That is another story.

By Mr. O'Neill:

Q. You were under the general supervision of Mr. H. G. Davis? A. Yes.

708 Q. And you reported to him from time to time and received his instructions? A. Along certain lines, yes, sir.

Q. Well, as to the general course of the work? A. Yes.

Q. As to placing the airway, for instance, on the east boundary line? A. No, sir.

Q. Did you have a drawing made? A. We have a map similar to the one you have seen here.

Q. And that drawing is given to you showing that the main airway is to be drawn on the easterly boundary? A. No, sir.

Q. What map is given to you? A. The map isn't made until after the workings are driven. 709

Q. Is there no map given to you at the start? A. No, sir.

Q. No engineering data given to you as to the dip of the seam? A. I don't understand just what you mean.

Q. It is plain enough. Think it over. Before you start on any particular work is there no engineering data given you? A. Yes, surely there is.

Q. Who gives you that? A. The engineer's office.

Q. And that, you follow? A. As near as we can; we determine our method or manner of opening the work by that data, to some extent. 710

Q. Mr. Davis has charge of those engineers? A. No, sir.

Q. Who has charge of them? A. The General Manager.

Q. Who is he? A. Mr. Phillips.

Q. Were the first, second, third, fourth and fifth cross cuts also twelve feet wide? A. I don't think they were; probably ten to twelve; I wouldn't be positive about that.

Q. But Yurkonis's working place or chamber leading from the main gangway and Fine's chamber, or his working place, leading from the main gangway, were how wide? A. Approximately twenty feet. 711

Q. At this particular place at the eastern boundary of Yurkonis's working place from which all of these cross cuts lead, there was no return airway, but the air was still going in, is that correct? A. The air returned through Yurkonis's gangway.

Q. You know what an airway is, as described,

712 from the intake of air, don't you? Was it an airway? A. Was what an airway?

Q. Any portion— A. What do you call an airway?

Q. A return airway—I call the main gangway the haulage way through which the air comes in. A. We use an airway for a haulage way, too.

Q. You do? A. All mines do.

Q. How high do you say this cross cut was? A. Well, about five feet.

Q. This is a gaseous mine, is it? A. Yes, sir.

Redirect examination by Mr. Thomsen:

713 Q. Something has been said in the statute about certain reports in writing. To whom do you report in writing? A. To the State Mine Inspector of our District; Mr. Davis.

By Mr. O'Neill:

Q. Who is he paid by? A. The State. He furnishes us with a blank form properly made up, and we fill that out with our measurements and the number of men on the different splits and send them to him once a month, and one to our District Superintendent, Mr. Davis, and keep the original at the mine.

714 By the Court:

Q. Suppose you were reporting the measurements in this Yurkonis gangway and you were making the measurements at the opening of the fifth cross cut, and another one at the opening of the sixth cross cut. How would you put it down in the book? A. We don't do that; the law requires that the intake in the cross cut at the particular split and at the return of the current—the up-cast shaft—

Q. You don't put in any measurements of the

number of cross cuts or the number of openings that affect the circulation? A. No, sir. 715

Q. You don't give the distances between them?
A. No, sir.

By Mr. O'Neill:

Q. You had not been entering that data for a long time before the accident?

Mr. Thomsen: Do you want to cross examine?

The Court: I think I have got it.

Q. You had not been reporting that information to your General Superintendent for a long period before this? A. We make that— 716

Q. Won't you answer the question? A. Why, yes; we report it every month.

Q. You reported what measurements? A. Our measurements in that split.

Q. What measurement or measurements did you report? A. The air that is traveling through not only that split, but all through the mine.

By the Court:

Q. But you said nothing about these cross cuts?
A. No.

By Mr. O'Neill: 717

Q. Or the number of them or the distances they were apart? A. No, sir.

Q. And you hadn't been doing that for at least a year before the accident? A. It is never done.

Q. (repeated): And you hadn't been doing it for at least a year before the accident? A. No, I hadn't; I had never done it.

Q. Where did you measure from? A. At the main intake at the cross cut; furthest in, at the return, near the foot of the up-cast shaft.

Q. Is that the only place? A. That is the only place, yes, sir.

718 Q. You took it at the inlet and the outlet? A. I took it at the inlet and the outlet and the furthest interior working; in three places.

Q. You, of course, are under the jurisdiction of Mr. Davis, who employs you, and he has authority to discharge you? A. Yes, sir.

Q. And select any other mine foreman that he desires? A. I presume he has that authority.

Redirect examination continued by Mr. Thomsen:

Q. These blank reports upon which you make your reports to the State officer are furnished you by him? A. Yes, sir.

719 Q. How long have you been making those reports, once a month? A. Ever since I have been a foreman.

Q. Every month? A. Yes, sir.

Q. Is there anybody over the mine inspector to whom you report? A. I guess he is under the supervision of the Governor.

Q. Who has charge of all the ventilating apparatus in the Pettibone mine?

Objected to as involving a conclusion.

The Court: He may answer what man is in charge in the sense of saying what has to be done to that machinery.

720

Exception.

A. I am.

Q. Anybody else? A. No, sir.

Counsel moves to strike out the answer as involving a conclusion, and in contradiction of the statute, which says that the owner and operator is responsible.

Motion denied.

The Court: Whether or not the agent or the owner is not in question; whether it is

the agent of the owner or whether he is merely representing the State of Pennsylvania is not the basis of considering whether or not the question involves a conclusion. I don't mean that that is not a question in the case.

721

Q. So far as the mechanical operation of the ventilation of the Pettibone Mine is concerned during the week of July 6th, 1911, who had absolute charge of that, control and authority over it? A. I did.

Q. Did anybody else participate in that?

Same objection, ruling and exception.

722

A. No, sir.

Recross examination by Mr. O'Neill:

Q. In addition to these duties with reference to making the tests of the air you also acted as foreman of the workmen? Did you, down there, the miners and helpers? A. Yes, sir.

Q. Gave them all their orders, what they were to do? A. Yes, sir.

Q. About the different kinds of work and the details of it? A. Yes, sir.

Q. You hired and discharged the workmen, did you? A. Yes, sir.

723

Q. You did this? A. Yes, sir.

Q. All of the workmen? A. All in that mine, under ground, yes, sir.

JOHN S. DAVIS, being duly sworn and examined as a witness for the defendant, testified as follows:

By Mr. Thomsen:

Q. Your name is John S. Davis? A. Yes, sir.

724 Q. Where do you reside? A. Dorrancetown, Pennsylvania.

Q. What is your business? A. Assistant foreman.

Q. Where? A. At the Pettibone Mine.

Q. Assistant mine foreman? A. Yes, sir.

Q. To whom are you assistant? A. Mr. Powell.

Q. How long have you been his assistant? A. In the neighborhood of 12 years.

Q. How long have you been assistant in the Pettibone Mine? A. 12 years.

Q. For the last 12 years? A. Yes, sir.

725 Q. Are you any relation to the other Davis who was sworn as a witness here? A. The superintendent?

Q. Yes. A. Not at all, no relation at all.

Q. When did you commence to work in coal mines? A. About 38 or 39 years ago.

Q. In what capacity have you worked in coal mines? A. I have done everything in the mines, almost, from door boy up to mining and up to assistant foreman.

Q. Have you been a coal miner? A. Yes, sir.

Q. How many years were you a coal miner? A. About three or four, or five years; I ain't sure; I never made a record of it.

726 Q. Were you in the shanty referred to by the plaintiff—did you hear the plaintiff's testimony? Were you in Court when the plaintiff was testifying? A. Yes, sir.

Q. You heard him refer to a shanty outside the mine? A. Yes, sir.

Q. Where he stated his number, 38? A. Yes, he called his number 38.

Q. Do you remember the morning of the accident, the 6th of July? A. Yes, sir, I do.

Q. When did you go to the mine? A. I stepped on the cage about 3 o'clock or 10 minutes after

3; just around 3 o'clock; not any later than 10 minutes after 3, and not before 3. 727

Q. In the morning? A. In the morning, yes.

Q. You went to work that morning, when? A. At 3 o'clock.

Q. What did you do first? A. Stepped down in the cage and went down and got off at the first seam and made an examination of those places and got on the cage again and went down to the five foot seam, this seam, where this man worked.

Q. Go on and tell what you did that morning. A. Well, I stepped off the cage at this five foot seam where this man worked, and walked on up till I came—well, I visited three or four places before I got to this place, and followed the air all the way around; I always do that for my own safety; I found everything all right and came to Yurkonis's place and made an examination of that place, and found it in perfect condition; safe, and clear of gases and in good, safe working condition; particularly safe. 728

Q. After you left his place, where did you go? A. I went around all the rest of the places.

Q. And made the same examination of all the places that you made of Yurkonis's place? A. The same, exactly.

Q. Then, what did you do afterwards? A. I went down to the foot of the shaft and rang for the cage and the engineer gave me the cage and I got on and went up on top of the shaft, and got off at the landing, and went into my office, and made a report of the examination, sat down and ate my breakfast and waited for the men. 729

Q. About what time did the first miner get there to go to work that morning? A. They generally start to call their number about 20 or 30 minutes after 7, or some a little earlier and some later.

730 Q. Was there any rule or regulation about the time of coming to work? A. Not at all, just so they come in time to go down to their work before 7. If they don't go down before 7 they have to go home.

Q. Was there any rule or regulation as to the time when they quit work? A. Oh, no; they quit at all hours; that is, the miners and the laborers; but company hands have to work till a quarter to 5.

By the Court:

731 Q. These miners are paid according to the amount of coal? A. Oh, yes, they are contractors.

Q. They are not on the day wages list? A. No, sir.

By Mr. Thomsen:

Q. They are paid according to the quantity of coal they mine each day? A. Yes, sir, and they don't go out before noon; they have to stay till noon; but after noon they can leave at any time; if they want to get out before noon they must ask permission from the mine foreman, and if he says they can go they can, and if he don't, they can't go. That is all.

732 Q. You say you heard the plaintiff's testimony on the witness stand? A. Yes, sir, I did hear it.

Q. Did you hear what he had to say about a conversation he had with you or Mr. Powell? A. Yes, sir.

Q. On the morning of the accident? A. Yes, sir.

Q. Go on and tell what conversation you had with him, and what you heard him say, if anything. A. Well, I was sitting at the window there, and they were coming and hollering their number so and so, and, Is the place all right? Yes, the place is all right, go ahead. Well, they

would turn away from the window and go towards the shaft. About 15 or 20 minutes to 7 who come along but this man Yurkonis, and hollered his number, and I said, All right, and he turned away and went off.

733

Q. That was all that was said that morning between you? A. That is all; not another word, not another word.

Q. I notice some scars on your hand? A. Yes, sir.

Q. How did you receive those? A. By a gas explosion.

Q. When? A. Oh, about 4 years ago.

Q. What work were you doing when you received it? A. I was in the same capacity as I am now; fire boss.

734

Q. In what mine? A. The Pettibone Mine; the same colliery.

Q. Where were you burned besides your hand? A. My face and the side of my head; the are entirely destroyed, and part of this ear gone; the flame seemed to strike right around my head.

Cross examined by Mr. O'Neill:

Q. The air was particularly good in Yurkonis's place? A. Yes, sir, and it was fine.

Q. Unusually good? A. Yes, sir, unusually good.

735

Q. You noticed that particularly that morning? A. Every morning; every morning the same.

Q. This morning you noticed it particularly? A. Yes, sir, I noticed it particularly.

Q. And it was particularly good down in this 6th crosscut, even though it was the end of the crosscut up against the boundary line? A. Yes, sir.

Q. And the very furthest place in the mine? A. Yes, sir, it was good.

736 Q. It was particularly good at the furthest place in the mine? A. Yes, it was.

Q. Are you a fire boss? A. No, sir.

Q. Who was the fire boss? A. I don't know who is fire boss.

Q. You don't know? A. No.

Q. Have you been talking with anybody about the law with respect to assistant foremen? A. No, sir; I read the law once in awhile; I am no fire boss.

Q. There is no fire boss in the mine? A. No, sir, not at all, as I know of.

737 Q. No fire boss in this mine at all? A. Not that I know of, no.

Q. Did anybody tell you that you should not claim that you were a fire boss, because it might affect some legal question as to your negligence? A. No, sir, because I ain't a fire boss; I am assistant foreman.

Q. Do you do the work of the fire boss? A. No, sir, I am doing the assistant foreman's work.

Q. Don't you know anything about the duties of a fire boss in the mine? A. There is no fire boss in any mine, unless he is appointed temporarily.

Q. Are you sure of that? A. I am sure; pretty sure, anyhow.

738 Q. I read you Section 9 of the Act of June 26, 1895:

"Section 9. And no person shall be permitted to act as fire boss in any coal mine or colliery, unless he has had five (5) years' practical experience in mines as a miner, three (3) of which he shall have had as miner (in mines) wherein noxious and explosive gases are evolved, and the said fire boss shall certify to the same before entering upon his duties, before an Alderman,

Justice of the Peace or other person authorized to administer oaths, and a copy of said deposition shall be filed with the district inspector of mines wherein said person is employed."

739

Q. (continued): Don't you know that there is a fire boss in every mine? A. No.

Q. Isn't it a fact that you call yourself an assistant mine foreman so as to endeavor to get under the decisions of the State of Pennsylvania with reference to assistant mine foremen? A. I am an assistant mine foreman, yes, sir; I am an assistant mine foreman.

By the Court:

740

Q. Did you go to this crosscut after the accident? A. Not until the next morning.

By Mr. O'Neill:

Q. I read this with reference to Rule 7 of the General Rules, of Article 12:

"It shall be the duty of the fire boss to remain at the danger station until relieved by some person authorized by himself or the mine foreman."

A. Will you allow me to explain that? If you knew anything about that, you wouldn't read it to me at all.

741

Q. This refers to a fire boss. A. I am not a fire boss. And there isn't any unless he is appointed by me or the mine foreman, temporarily.

Q. There is no permanent fire boss? A. No, sir.

Q. You had no regular fire boss at that place? A. No, sir; I am the assistant mine foreman; there is no fire boss in the mine at all.

By the Court:

Q. Do you do work which a fire boss would do

742 if you had appointed one? A. Yes; I can relieve that fellow.

Q. Mr. Powell doesn't do any of the work of a fire boss? A. Oh no; not in the morning; but when he goes around through the day he and I does about the same thing; we examine the place and see that it is safe.

By Mr. O'Neill:

Q. Is that the work of the fire boss? A. No, that is the mine foreman's and assistant mine foreman's work.

743 Q. What does the fire boss do? A. I go through the mine and make my examination in the morning, and probably there is a cave-in in the heading, or there is something knocked out and I find a body of gas in the place; I go outside and appoint a temporary fire boss to go down there and take care of that place, and not leave anybody in that portion of the mine until I come down and relieve him and make that place safe, through my inspecting the work.

Q. You go ahead and appoint any miner that you want? A. Anybody that is—you read it; that is all right.

744 Q. I read it, but you don't know it. A. I don't, eh? Don't you fool yourself; any man that has had any experience—I don't want any foreigner that has just landed to do it.

Q. Do you look to see whether he has filed a certificate? A. Oh, I know pretty well who has and who has not.

Q. Who has filed a certificate down in that mine as a fire boss? A. They don't file those certificates.

Q. I just told you that you didn't know what I read. A. Is that so?

Q. Yes, I will read it to you again. Tell us who it is down in that mine that you know has done

what this Section 9 provides? A. Well, read it here (indicating). 745

Q. You see you don't know it. (Reading):

"Section 9. And no person shall be permitted to act as fire boss in any coal mine or colliery unless he has had five (5) years' practical experience in mines as a miner, three (3) of which he shall have had as a miner (in mines) wherein noxious and explosive gases are evolved, and the said fire boss shall certify to the same before entering upon his duties, before an alderman, justice of the peace or other person authorized to administer oaths, and a copy of said deposition shall be filed with the district inspector of mines wherein said person is employed." 746

Now, I ask you, suppose upon the day that Yurkonis was hurt there was a necessity for the other fire boss that you speak of. Tell us who in that mine that you knew had filed such a certificate? A. There was no necessity.

Q. Did you know any person in that mine who had filed a certificate of that character, whom you could designate as fire boss? A. Yes, sir.

Q. Who? A. Do you want me to mention his name? 747

Q. Yes. A. A man by the name of Mat Kailin.

Q. Had he filed those certificates? A. Yes, sir.

Q. Have you seen it? A. Yes, sir.

Q. Have you ever designated him as fire boss? A. Yes, sir, I did.

Q. Was he acting as a licensed miner? A. No, they were brattice men; brattice men, as a rule, has those papers.

Q. Is Mat Kailin a brattice man? A. A brattice man, yes.

748 By the Court:

Q. Then you did know something of that Section 9? A. You bet I did.

By Mr. O'Neill:

Q. Give me the names of the men that you know had filed those certificates, and you knew had filed them at the time Yurkonis was hurt? A. Not that filed them at that time, oh no. They were filed before that; they had those papers; they had filed them before this. Mat Kailin was one.

Q. How do you spell his last name? A. I don't know.

749 Q. You saw the papers filed, did you? A. No, I haven't seen them.

Q. How do you know he filed them? A. Because I know that he did get them.

Q. How do you know it? A. I don't know it positively; but he acted in that capacity, and he had them papers.

Q. You have been swearing here very glibly that you knew lots of men down there that had those papers. You didn't see Mat Kailin's certificate, did you? A. No, I didn't see his certificate.

750 Q. Is there anybody else down there who was working out in the mine at the time Yurkonis was hurt who had filed such a certificate as fire boss, and which certificate you had seen? A. No, sir.

Q. Not one? A. No.

Q. So you can bet you don't know it now? A. They have the assistant mine foreman's papers.

Q. Did you, yourself, file a certificate as fire boss? A. No, sir.

Q. Mat Kailin didn't, so far as you know? A. What did you say?

Q. Did Mat Kailin, so far as you know, ever file a certificate subject to Section 9? A. Yes, sir, I was informed that he did.

Q. Who told you? A. Himself.

751

Q. You never asked to look at it? A. No, sir.

Q. You didn't know when he filed it? A. No, sir, I don't make a record of it, no; I took his word for it.

Q. And nobody else did? A. I don't know.

Q. You said before that there were several of them; who are the others? A. Well, I misunderstood you. I have met men assistants to mine foremen.

Q. Isn't it a fact that you and the other men all claim to be assistant mine foremen in order to get the benefit of certain decisions of the State of Pennsylvania? A. No, sir, no, sir.

752

Q. Didn't you talk with the lawyers about that? Didn't you speak with Mr. Thomsen and this other lawyer of Pennsylvania, and didn't they tell you that you should claim that you were an assistant mine foreman, and not a fire boss? A. No, sir, they never did.

Q. Didn't they explain to you that if you said you were a fire boss that the company would be responsible for your acts, whereas if you were an assistant mine foreman the company might not be? A. No, sir, they did not.

Q. Will you swear upon your oath that Mat Kailin has, distinguished from his assistant mine foreman papers, the papers as a fire boss? A. I won't swear to it, because I only heard through hearsay.

753

Q. Are you sure that Mat Kailin told you that? A. He told me that.

Q. When did he tell you? A. Well, I don't know.

Q. Where was it he told you? A. At the mine.

Q. Was it 10 years ago? A. Oh no; it ain't that long.

Q. Have you talked with the lawyer for the com-

754 pany at all about this case? A. They subpoenaed me; certainly I had to state to them what I knew about the case.

Q. They explained to you carefully about this Section 9 law? A. No, I explained to them very carefully what I knew about the case.

Q. You explained to them as carefully as you did to the jury these things that you don't know? A. I see that you don't know a lot that you are talking about, either.

755 Q. I have demonstrated to you that you have been swearing about a lot of things that you didn't know; about the several men who had the fire boss papers. A. Well, it was just through misunderstanding your questions.

Q. You are under oath, and you swore that you knew several men had these papers, when you didn't know that any of them had them? A. Well, I knew it through some one saying it.

Redirect examination by Mr. Thomsen:

Q. You have certified papers, haven't you? A. Yes, sir.

Q. As a mine foreman? A. Assistant mine foreman, yes.

Q. You say you went to work on the morning of the accident about 3 o'clock? A. Yes, sir.

756 Q. What time did you quit work that day? A. Twelve o'clock.

Q. Is that your regular hour for going off? A. Yes, sir.

Q. And this accident occurred in the afternoon? A. Yes, I understood it occurred in the afternoon.

Q. Where were you then? A. At my home.

Q. You didn't go down in the mine till the next morning? A. I didn't hear till the next morning that the man was hurt.

Recross examination by Mr. O'Neill:

Q. When did you get your certified mine papers? A. In 1903.

Q. Have you got any new ones since that? A. No. 757

DAVID T. DAVIS, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. Thomsen:

Q. Where do you reside? A. Wilkesbarre, Pennsylvania.

Q. How long have you lived there? A. Eight years.

Q. How long have you been a resident of the State of Pennsylvania? A. All my life; 48 years.

Q. Are you any relation to Mr. Henry Davis, the previous witness? A. None whatsoever. 758

Q. Then there was John S. Davis; are you any relation to him? A. None.

Q. What is your business? A. Inspector of Mines for the State of Pennsylvania.

Q. How are you chosen inspector of mines? A. By the vote of the people, after an examination.

Q. That is, you can't become a candidate for that office until you have passed an examination? A. No.

Q. And until your name appears on the ballot? A. Yes.

Q. You were elected to your position by the people on Election Day? A. On Election Day, yes, sir. 759

Q. By ballot? A. By ballot.

Q. What district do you represent? A. The 9th Subdistrict of No. 1 District.

Q. Have you any superior officer in the organization, the State Organization? A. Yes, sir.

Q. Who is he? A. James E. Roderick.

Q. What is his title? A. Chief of the Department of Mines.

760 Q. Have you been present in Court during the taking of all the testimony in this case? A. I appeared in Court here on Tuesday morning.

Q. Since Tuesday morning you have been here?
A. Yes.

Q. Did you hear the plaintiff's testimony? A. I did.

Q. Just explain to the jury what your experience has been in relation to coal mining? A. I started to dig in the breaker breaking slate when I was 8 years of age; at 9 I worked with my father in the mine, and at 10; at 11 and 12 I was tending door; afterwards I was driving the mules and running
761 cars, and track-laying; apprentice, laborer, miner, chief inspector for Stickney & Cunningham, No. 1 Broadway; looking after the coal for the market, mining engineer for 9 years, and mine inspector for 12; going on 12.

Q. In your present position what are your duties? Describe them. A. The duties of a mine inspector are to examine the mines in the district once every three months; and as much oftener as the necessities of the case and the conditions of the mines require. Look after the welfare of the men employed and the preservation of the property of the operators.

762 Q. How do you inspect those mines? Do you do it personally? A. Yes, sir.

Q. How do you make the inspection? Describe that. A. If I enter a chamber I generally note the ventilation, and have the miner sound his roof to find out the condition of the same, to see in what manner he has his place secured for his safety.

Q. In an inspection of that kind do you enter every level, yourself? A. Yes, sir.

Q. Do you inspect the ventilating apparatus?
A. Yes, sir.

Q. The system of ventilation? A. Yes, sir.

Q. And, in general, you overlook all the mining operations which occur there? A. Both in and out. 763

Q. And so far as you can see you find out how things are being done? A. I see if the mining law is complied with.

Q. Do you have to make a report of that? A. Yes, sir.

Q. How often? A. Once every 4 months.

Q. To whom do you make a report? A. To the Chief of the Department of Mines.

Q. A written report? A. Yes, sir.

Q. Have you any duty as to the examination of any foreman or assistant foreman or miner? A. I am the ex officio of a Board appointed by the Court of Common Pleas, Common Pleas Court, First Term in every year; they appoint a Board composed of the mine inspector, who is ex officio a superintendent or operator, and two practical miners, two qualified men, as foreman and assistant foreman of mines. 764

Q. How do you get at their qualification? A. The Board gets up a set of questions, and we present each candidate with printed questions at every session, and the examination lasts from 9 in the morning until 12 noon; and from 1 till 4, for 2 days. After the examination is over the Board meets and looks over these papers and gives each one merits or demerits, according to the answers. 765

Q. And those who have reached a certain point in their answers are certified? A. They become certified; that is, we make out a duplicate certificate and send them to the State Department of Mines, when they are furnished with a permanent certificate.

Q. And that is delivered to them then? A. That is delivered to the miner who is successful.

Q. How many of these classes of certificates does that Board issue? A. Two.

766 Q. What for? A. Mine foreman and assistant.

Q. Are you acquainted with the inspector of the district in which the Pettibone Mine was located in July 6, 1911? A. Yes, sir.

Q. What was his name? A. Thomas J. Williams.

Q. How long had he been an inspector of that district at that time, do you know? A. Not any more than a week.

767 Q. Explain why he was there only a week? A. The inspector previous to Mr. Williams, of that district, was P. M. Boyle, of Kingston; Mr. Boyle was taken sick very suddenly around the middle of June, or thereabouts, and he was compelled to go to the hospital, Mercy Hospital, and he was operated upon, and I think he died in a day or two following the operation.

Q. Mr. Williams was appointed in his place? A. Mr. Williams succeeded him.

By the Court:

Q. Have you succeeded Mr. Williams? A. No, sir, I am in the other district; the adjoining district.

By Mr. Thomsen:

768 Q. How are mines classified? Is there more than one class of mine, as to being gaseous? A. Gaseous and non-gaseous.

Q. Those are the terms that are used? A. Yes, sir.

Q. Is there any other classification of mines? A. Not that I can recall.

Q. How many gaseous mines have you in your district? A. Twenty-five.

Q. Will you explain to the jury if you can, the operation of a miner in mining coal with his helper, in a chamber about 26 feet deep and about 12 feet

wide, in a 5 foot face, as to his method of merely mining coal; what his duties are and what he goes through in such a chamber?

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Objected to upon the ground that it is immaterial, because it is not in dispute as to what the correct method is. The plaintiff and the defendant are in accord as to that. The only contention we make here is that the defendant did not pursue or permit the correct method.

The Court: I think that the method has been described in so far as it is material to the case.

Mr. Thomsen: This man is a very competent man, and he is a disinterested man; he is a State official and has evidently been promoted to his position because people have confidence in his intelligence; I should like to have him describe how a miner properly mines coal in such a place.

770

The Court: I do not see any issue or that any of those questions enter.

Mr. Thomsen: That is the only way it is important, if it is important.

Objection sustained; exception.

Mr. O'Neill: The objection is made solely upon the ground that the point is not in issue.

771

Mr. Thomsen: The conduct of Yurkonis is in issue.

The Court: You may ask him the direct question, as to any particular thing.

Q. Assume such a chamber as I have described, and a miner is working there who has drilled a hole 5½ feet deep, and has loaded that hole, and tamped it, and withdrawn his needle and placed a squib in it like the one that is on exhibition here,

772 how would he light that squib if he did it properly?
A. He would light that with a piece of touch paper.

Q. How would he light the touch paper? A. He would have his lamp back at a certain distance; assuming the hole is right here in the solid coal, he would step back here, and his lamp would be in this point here, and just touch the paper and convey it— If it is far enough back it is all right. It would be all right on the ground.

Q. How long after he lit that squib would it burn before it reached the powder and caused a blast? A. I should think anywhere from a minute and a half to 2 minutes.

773 Q. What would change the conditions, if anything, as to that time? A. The greater the current concentrated upon the squib the faster it would burn.

Q. The current of what? A. Current of air.

Q. Why is that? A. Well, just the same as if you would blow upon a piece of punk, or anything like that, you have a tendency to make it burn faster.

Q. The draft of air? A. The draft of the air, and current.

Q. And the oxygen which was in the air? A. Yes, sir.

774 Q. What does the miner do after he has lighted the squib? A. After he lights the squib he retreats to a place of safety.

Q. He picks up his open lamp and carries it with him? A. He picks up his open lamp and carries it with him, yes.

Q. From your experience with gaseous mines what would be the action of gas in a chamber of that description, providing there were gas exuding from the mine and from the coal; what would be

its action? A. If the crosscut were driven down hill? 775

Q. A 5 degree dip. A. The gas exuding from the coal would naturally rise to the ceiling and work its way out to the main current.

Q. Would it be possible under any condition of gas in a chamber like what I have described, with a 5-degree dip, for a double explosion, gas explosion, to occur under any circumstances within two minutes' interval, or any interval of a period of not to exceed 2 minutes? A. No.

Q. Tell the jury why that is so. A. The specific gravity of air would be, we will assume, one; the weight of gas is practically one-half, and is just like a child holding a balloon right here in the room the higher the child holds it, leaves it loose, it instantly rises to the ceiling, and if there is an opening there anywhere it will get outside; gas acts just exactly on the same principle; there is a little pitch of 5 degrees from where he worked in the place, upward; and he couldn't detect it, it wouldn't be of sufficient quantity. The moment it comes out of the pores of the coal away it goes. 776

Q. The floor of the mine is composed of what material? A. Rock.

Q. And the roof is what? A. Rock.

Q. And the coal lies between these two strata of rock? A. Yes, sir. 777

Q. Assume in a chamber of the dimensions described, which we have referred to here in this examination, having for its ventilating apparatus merely a brattice which only comes up to within 12 feet of the entrance to that working place, and the working place is the last one in the end of what we call the chamber; this was the 6th and last one up against the property line. Could a miner work in there from 7 o'clock in the morning or half-past 7 we will say, until the afternoon unless there was

778 a certain amount of ventilation, providing it was a gaseous mine? A. He could not.

Q. Why not? A. Each miner requires at least 200 cubic feet of air per minute and if the place was stale and there was lack of ventilation he could not work in there on that account.

Mr. O'Neill: I move to strike out the answer. The human experience of all mankind is exactly against that statement.

779 The Court: The question was: Assume those conditions whether a man could work there, and the answer is he could not, because under those conditions he couldn't. I don't think the question is answered. The witness has simply said that he couldn't because he couldn't. The question really calls for the reason.

The Witness: I must understand the question before I can answer it then.

The question is read to the witness.

A. He could not.

780 Q. Why? A. The miner must have air and in a place such as is described here as pitching 5 degrees, the air coming in there would naturally force down itself upon its own specific gravity. It is more easy to ventilate a place going down a hill than it is one going up a pitch. It requires more pressure behind to push it up hill; whereas, going down, the dip it would naturally fall upon its own weight.

Q. Assume that condition of a lack of ventilation in such a chamber and the expiration of gas, more or less, from the coal, what would be the shape of the gas cloud in that chamber?

Objected to as purely conjectural and theoretical.

The Court: The witness may answer where

the gas would collect. He may say whether it was in that stratum along the ceiling or whether it would be located in places along throughout the chamber.

781

Exception.

A. If you want me to understand that it would be a flat place and making gas without a current, there would be a stratification of gas there.

Q. What would be the shape of that stratification of gas? A. If the roof was level—

Q. I mean on this dip. A. There would be no gas on the dip.

Q. There would be gas going along the ceiling in the other place?

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The Court: The question is whether it rises up to the ceiling and passes off in a layer right under the ceiling, or would it go off in small particles through the air generally, in the chamber.

A. Coal is porous. Just as long as the coal comes out of the pores of the coal in such a condition it rises to the ceiling, and out.

Q. So that it would go up to the ceiling and then along the ceiling? A. Yes, sir.

Q. Whether it comes out of the sides or out of the face at the end, it would rise right up along the side wall to the ceiling? A. Yes; even though it came from the floor.

783

Q. Well, the floor is rock? A. Well, sometimes the rock makes gas. It would work just as I stated, as a child lets go a balloon, instantly it would go up to the ceiling and work its way out.

Q. Here is a dip of five degrees in this particular chamber. Now, with ventilation sufficient for a workman to work there and gas oozing from the coal, that gas rises at once to the ceiling and

784 proceeds out along the ceiling out of the entrance to this working place and into the chamber beyond? A. Into the main current.

Q. Now, is there any difference on a five-foot dip in the thickness of volume of gas as between the entrance to the chamber and the heading? A. There is no difference.

Q. Well, what is it? A. There would be no difference.

785 Q. It would be the same thickness all the way along the ceiling? A. Well, you couldn't get a thickness at all. Even though that coal down in the cross cut was making a terrific amount of gas it goes out instantly until you can't detect it even though you take a safety lamp and hold up to the roof; the flame itself don't show because it goes out so quick.

Q. That is when it is going out on account of ventilation? A. Yes.

Q. And is that true? The ventilation is sufficient for a man to work in it? A. Yes, sir.

Q. Will it do that when there is no ventilation at all because of the dip? A. Yes, even though no ventilation were there you couldn't detect any gas there.

786 Q. Then, as I understand you, that cloud which gas makes along the ceiling would be the same thickness all along the ceiling so far as its depth was concerned? A. Gas don't appear in clouds.

Q. The dip wouldn't make any change as to that? A. None whatever.

Q. We will assume that in a chamber of that kind with this flow of gas that the conditions were such that it could be exploded by elevating the light of an open lamp into it; what would be the effect of a gas explosion under those conditions? A. The oxygen of the air would be consumed.

Q. With such a dip under those conditions,

could there be an explosion under those conditions? A. None whatever. 787

By the Foreman:

Q. Did I understand you to say that the foreman and assistant foreman each took a two-day examination, an examination that lasted two days?

A. Yes.

Q. Each applicant for a certificate is taking an examination for two whole days? A. Yes, sir.

Cross examined by Mr. O'Neill:

Q. Do you mean that on two whole days you examine all the applicants? A. On two whole days examine all the applicants. 788

By the Court:

Q. But are they all working on questions and answers for two days, or do you take them one after the other, and it takes two days to go through the lot? A. They are set in the same room for two days.

Q. They all have two days? A. They all have two days to answer whatever questions they have.

By Mr. O'Neill:

Q. In addition to the miners who are examined there are fire bosses in mines, aren't there? A. Yes. 789

Q. That is, in addition to the certificated mine foremen and assistant mine foremen there are fire bosses? A. Yes, sir.

Q. There is a night and a day fire boss? A. There is a night and a day fire boss, yes.

Q. He isn't examined by a Board? A. No; he files his certificate with the mine inspector.

Q. And he has different duties, too? A. Yes.

Q. And every mine has a fire boss? A. Every gaseous mine.

790 Q. Every mine has a night and a day fire boss, is that right? A. That is right.

Q. When a man is examined to obtain a certificate as a certified mine foreman or a certified assistant mine foreman or a certified miner, he is merely certified as to his competency; is that correct? A. It is necessary for him to give his experience.

Q. And after he receives the certificate he may be employed by any mine operator; is that correct? A. Yes, he may be.

791 Q. That is to say, no operator is obliged to select any particular mine foreman or assistant mine foreman or any miner; is that correct? A. He may select any person who has such a certificate whomsoever he will.

Q. And the tenure of their employment and the continuation of their employment depends entirely upon the mine operator himself? A. Yes, sir.

Q. That is, his choice? A. It depends on the mine operator or superintendent.

792 Q. In other words, merely because a man gets a certificate as a certified mine foreman or assistant mine foreman or miner does not mean that the miner must employ any particular man, but that he must merely select a person who has such a certificate? A. He must appoint a person certified.

Q. But he can select any person he wants of the great group of persons having such certificates? A. Yes.

Q. Were you here this morning? A. Yes.

Q. Did you come over here to testify in this case on behalf of the company, without any subpoena? A. I was—

Q. Answer the question just as straight and direct as it can be. A. I was asked to come here.

Q. Why don't you say I didn't have a subpoena?

That is the answer, isn't it? Nobody subpoenaed you? A. I haven't been subpoenaed. 793

Q. You know you didn't have to come; you merely came at the request of the company, is that correct? A. I came at the request of one of their attorneys.

Q. Did you ever work for this company? A. Never.

Q. Or any other mining company? A. Yes, sir.

Q. Which mining company? A. I worked for several individual companies when I was a boy.

Q. Which attorney requested you to come over here? A. Mr. Oliver.

Q. Do you know him quite well? A. Not so very well; I have met him once. 794

Q. Although you only met him once— A. Or twice.

Q. —or twice, when he requested you to leave your official duties in the State of Pennsylvania you came over here to testify in this case; is that correct? A. Yes.

Q. Are you paid a State salary? A. The State pays my salary.

Q. But when the attorney for the defendant railroad company requested you to leave your position for which you are being paid by the State you came over here to testify for this company; is that correct? A. I came here at the request of the company's attorney. 795

Q. When you run for office do you find that it assists you to be elected at all to have the assistance of these mine foremen and the attorneys for the railroad company? A. No, sir.

Q. Do they help you to get your nomination? A. No.

Q. Mr. Williams, the mine inspector of this particular district at the time Yurkonis was hurt, is he here? A. Yes.

796 Q. Also leaving his duties in the State of Pennsylvania? A. Yes, sir.

By the Court:

Q. Who acts as inspector when you are not there? A. My colleague.

Q. There is more than one inspector in each district? A. Yes.

Q. More than one in each district? A. No; the adjoining district inspector looks after my work.

Q. When you two are over here one man covers three districts? A. No, sir.

797 Q. Well, he covers two then? A. He covers two, yes.

Q. Another man looks after Mr. Williams' district? A. Yes, sir.

Q. Can gas be detected even if there is no ventilation? A. It can be.

Q. Didn't you testify on your direct examination to the extraordinary statement that it cannot be detected even if there is no ventilation? A. Under the conditions that were described, where this man was working.

Q. Didn't you say that it couldn't be detected even with a safety lamp, if there was no ventilation? A. I said so.

798 Q. And you think that, do you? A. Yes, sir.

Q. Gas comes from the face of the coal frequently through chambers and blowers, don't it? A. Yes, sir.

Q. A feeder or several feeders may be issuing gas which come up in different columns and ascends towards the roof? A. Yes.

Q. And that may be continuous? A. It goes right on out.

Q. It takes some time on its trip out, don't it? A. It takes some time, yes.

Q. This dip that you speak of as 5 degrees, what

do you say would be the distance from here to that wall? A. 50 feet. 799

Q. So that the dip you refer to would merely be a dip from the edge of this table to the end of that stone there, wouldn't it (indicating)? A. That would be about the line of the dip.

The Court: Take it from the level of the top of the table to the lowest black mark.

Q. You see taking from the edge of this table down to that lowest black mark there that there is not much of a dip, is there? A. No. You want to take the entire thickness of the face; you have that wedge-shaped there; you should measure down to the floor; take a passageway and strike your roof off from this point (illustrating). 800

Q. If you take a certain percentage of dip it is the same as if it is 10 miles, isn't it? A. Yes.

Q. What I want to show you is that that is not a side wall, or roof like that on which gas rushes out, like up a flue? A. Yes, I see that.

Q. So that if there is a feeder which is constantly blowing, or one or two of them, from the side it would make a continuous stream along the roof? A. It would.

Q. So that at all times there would be gas at the roof if there was a chamber near the face? A. There would be some.

Q. And if a man walked out towards the edge of the crosscut it would be denser? A. Not any. 801

Q. As it approached the highest point of the roof wouldn't it be getting denser? A. No, sir.

Q. Suppose there was no ventilation at all in that mine at that end, and the feeder kept constantly issuing quantities of gas which went to the roof; could the gas be detected by a safety lamp? A. No.

802 Q. Why not? A. Because there wouldn't be sufficient.

Q. How do you know? It depends on how many feeders there were— Suppose there are 3 constant feeders and they have been feeding along there for an hour with no ventilation in a small space; tell me why you couldn't see it with a safety lamp? A. Because there would be such a thin film.

Q. That would depend on how long it was issuing? A. If there was no ventilation there it possibly may be so pure; that thin film.

803 Q. It possibly may be anything; but why can't you detect gas where there is no ventilation, with a safety lamp? A. You can't when it is deep that way on account of it rising and going out so fast.

Q. To where? A. To the edge, or where the dip changes.

Q. And stays there? A. It may stay there; that is not in this one entrance, remember; but after it gets outside the dip; whatever the condition may be outside of the corners—

Q. Suppose there is no ventilation out there? A. Then it would accumulate there.

Q. Gas may light without exploding? A. It may.

Q. Gas may explode with a slight explosive force or with terrific explosive force? A. It depends on the quantity of air.

804 Q. And to what extent does gas expand when it does explode? A. About 9 times.

Q. As it explodes does it tend to force things down? A. It does. It works in that direction as well as working out.

Q. Principally down though? A. Not principally, no.

By the Court:

Q. If there is a stone roof and the gas expands it would have to expand as it naturally goes— A.

It couldn't go higher, but it may go out along the roof. 805

By Mr. O'Neill:

Q. If there is some room down out of place towards the entrance the greater pressure will be exerted downward? A. There is hardly any pressure at all when the gas ignites; that is, at the point of ignition.

Q. Is there any pressure when it explodes? A. Terrific; according to the amount.

Q. Do you get paid any money for coming here? A. Not to my knowledge.

Q. Well, you ought to know? A. I haven't spoken to any person in reference to pay. No one has spoken to me either. 806

Q. Has any one intimated to you that you would get money? A. Not in the least.

Q. Well, without money and without knowing Mr. Oliver very well, and without these people being of any political assistance to you, you voluntarily came here to give your time? A. Yes, sir.

Q. Without pay? A. Without pay, so far as I know.

Q. Without hopes? A. I may have faint hopes; I usually don't work for nothing.

Redirect examination by Mr. Thomsen:

Q. In the mining district as you know it, what is the practice of ventilating; what is the brattice made of that goes into a workman's place where he works? A. What is the brattice composed of? 807

Q. Yes. A. Usually hemlock boards.

Q. Is there any canvas used? A. There usually is, at the end of the brattice.

Q. Do officials look upon that as a proper brattice? A. Yes.

Q. And the crosscut behind the one which is being worked on; is that always left open for ventilating purposes? A. Generally.

808

Q. The last one through, I mean. A. Yes.

Q. How is the one behind that closed up, as a rule; by a permanent or a temporary structure?

A. Where we have crosscuts in this section of the mine that you refer to now?

Q. The one behind the last opening; the men are digging one and the one behind that is always open? A. Yes, sir.

Q. Now, the next one behind the open one? A. That is usually constructed of temporary stuff.

Q. That is considered a proper method under those conditions? A. We consider that proper ventilation.

809

By the Foreman:

Q. "Usually," you say. Do they ever close that up permanently before they get through with the last one? A. Sometimes in non-gaseous portions—

Q. I am talking of gas mines now. A. No.

By Mr. Thomsen:

810

Q. You remember Mr. O'Neill's question about the testing of gas. Assuming that there was no ventilation and the gas came out and finally accumulated in the outside chamber so that it could be known that it was in the chamber itself, and the heading, by the use of the lamp; that is, the volume got sufficient so that you could discover gas in working there, and that gas was exploded. What would be the effect of such explosion? A. The explosion would be felt over the entire district.

Q. Would it kill any man that was in the chamber? A. It will kill any person within immediate vicinity; that is, in proximity thereto.

Q. I mean if such an amount of gas exploded could a man survive it? A. I don't think so.

Q. Would he show any effects of the explosion

so that it could be told that he had been the victim of a gas explosion? A. He certainly would. 811

Recross examination by Mr. O'Neill:

Q. Suppose there was ventilation and the ventilation to some extent failed; although not totally. Would there be enough air for the man to live and work in, and still there might be a dangerous accumulation of gas which might light up? A. Not in such conditions.

Q. Will you keep your mind on my question (repeated)? Would there be enough air for the man to live and work in, and still there might be a dangerous accumulation of gas which might light up? A. Under what conditions? In that same place that is dip— 812

Q. Well, suppose it is on a level. A. The gas would accumulate.

Q. And the man might live and work there and the gas might accumulate and light up; is that correct? A. Yes, it might.

It is conceded that the amended complaint was served on defendant's attorneys October 17, 1913.

Mr. Thomsen: I should like to offer in evidence the pleadings in this case.

The Court: They are a part of the record, and of course any part of them that you wish may be used. 813

Mr. Thomsen: I offer in evidence all of the summons and complaint, the amended complaint and the defendant's answer.

The Court: They are all admissible if they are material in any way.

Mr. O'Neill: We object to his answer. It is not admissible in evidence.

814

The Court: They are admissible if there is proof of anything that is material.

Mr. O'Neill: His answer is not admissible in his own favor.

The Court: It is admissible if it affects any issue. I will rule on it and you can take an exception at any time that any part of it is added.

Mr. O'Neill: I object to the defendant's answer being introduced in evidence. Of course it is always before the Court; but I object to its being in evidence, it being a self-serving declaration and introduced in their own favor.

815

The Court: The offer may stand, and any part of it may be added to the record that is material. I will rule on it at the time that they wish to use any part of it.

Mr. Thomsen: I should like to have it conceded that the original summons in the action was served on the 7th day of May, 1913. And I would like that Mr. Oliver read in a few more sentences of the Anthracite Law that we think is applicable in this case.

Mr. O'Neill: I object to their reading anything that is not pleaded.

816

The Court: The Anthracite Mining Law may go in evidence.

Plaintiff excepts.

The Court: I think the shortest way is to consider the whole law in evidence, and simply let it be understood that any part that is not material may be either disregarded or eliminated; so that anything that you wish to read to the jury, either of you, may be used.

Mr. Thomsen: That is satisfactory.

817

Mr. Oliver: Article 8, Section 1 of the Act of June 2, 1891; Section 2 of the same article; Section 4 of the same article, Section 6 of the same article, Article 12, Rule 1, Rule 2, Rule 3, Rule 5, Rule 12, Rule 14, Rule 24, Rule 33, Rule 34; the Act of June 15, 1897, with particular reference to Sections 1, 2, 4, 5, 6. The Act of June 8, 1901, with particular reference to the second paragraph of Section 17. I think that is all.

Mr. Thomsen: I offer in evidence Exhibit C, simply as a free hand representation of the section of the coal mine, which has been used in illustrating certain evidence which has been taken in the case; used by some of the witnesses and referred to merely to show, as an illustration, and not as any actual condition of the Pettibone Coal Mine.

818

Objected to.

The Court: The testimony having shown that the door in the Fine working brattice was shut, shown in this exhibit it is left open, to indicate that it is a door; and testimony also having been introduced that after a piece of canvas had been set up at the end of the brattice in Yurkonis' chamber it occupied the position of the dots, and leaving it to the jury to find out what was the condition at the time of the explosion, I will let it go in evidence. But I want the jury to notice that Mr. Davis said that this door was shut as it is in that rough sketch here used. But he has indicated it open merely to show that it is a door, and that here he has drawn a red

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line to mark the brattice, simply drawing it down to a point opposite the corner, and then he has put in 3 or 4 dots to represent where canvas would be; but he has not thereby testified as to anything about the time of the accident, because he didn't give testimony as to that.

Mr. O'Neill: The jury will understand that the plaintiff claims that the diagram is inaccurate.

821

The Court: Yes; the jury will remember that the plaintiff's testimony was that the crosscut was deeper than 21 feet, and that the brattice was back from the corner, and two of the witnesses said that the canvas was hanging.

Defendant Rests.

Testimony in Rebuttal.

MATT YURKONIS, recalled in rebuttal, testifies through the interpreter:

By Mr. O'Neill:

822

Q. Would a miner driving the main gangway be paid a different rate of wages than when he is driving the working place from which the crosscut led? A. Yes, sir.

Q. It is higher pay for the gangway? A. Yes, sir.

Q. And in the working place where all these crosscuts lead off he is paid a lower rate? A. Yes, sir.

Q. That is known as the working place where the crosscuts come off? A. No; it is just a crosscut.

Q. But the thing from which all the crosscuts

come off isn't that the working place, or chamber? 823

A. Yes, that is the working place.

Q. It has been claimed here by one or two witnesses for the company that on the day you were injured the brattice came up to the corner and a canvas extended in some 10 or 8 or 18 feet into the 6th crosscut; is that true? A. No.

Q. It ended, as you said before— A. Well, there was no canvas in the crosscut at all.

Q. And no wooden brattice for 8 or 10 or 12 feet back? A. No.

Cross examined by Mr. Thomsen:

Q. I am the railroad company's lawyer; I am here against you again. I am attorney on the other side. A. Well, that is all right. 824

Q. You have said that when this accident occurred you were knocked down twice by two gas explosions. How much time was there between the first explosion and the second one? A. Well just when I was knocked down at the first I put my cap on my head and it lighted the gas and knocked me down; afterwards it knocked me down, and when I went to get up right away—and the next time on the left side it knocked me down and turned my face right to the shot.

By Mr. O'Neill:

Q. At the time you say you were knocked down, did you feel any flame on your body? A. Well, it knocked me down at first and when I went to get up, and the second time it knocked me down, and as soon as it knocked me down the shot came. 825

Q. The Judge wants to know when you were first knocked down, or just before you were first knocked down, did you feel any flame, any burn? A. Right on my head (indicating by putting his hand on top of his head).

826 By the Court:

Q. Did you try to get out of the way of the flame, or didn't you have time to dodge? A. No, I had no time.

Q. You went down? A. Yes, it knocked me down.

Q. Had you got your cap on your head, or was it all in front of your head? A. Well, I could not put it on.

CLARENCE FINE, recalled in rebuttal:

By Mr. O'Neill:

827 Q. When you were driving a gangway as a miner you are paid at one rate, aren't you? A. Well, there are different rates according to the size of the vein.

Q. Well, if you are paid a certain rate per ton— A. No, you get yardage and tonnage.

Q. For driving this main gangway from the shaft you were paid at a certain rate, were you? A. We were paid different rates, yes.

Q. But when you would drive this working chamber of yours, you were paid at a lower rate, weren't you? A. We were paid different rates, according to the place we are working.

828 Q. What I want you to tell me is that this place that you were working in was a chamber. A. Well, it isn't called a chamber in all the workings that I have worked.

Q. Well, you called it a chamber until Mr. Davis took the stand, didn't you? Didn't you call it a chamber? A. No, not to my knowledge.

Q. What did you call it? A. It was a gangway; it was understood to be a gangway.

By the Court:

Q. Did you have anything to do with the put-

ting of the canvas back? A. No, sir, I did not; I helped carry Mr. Yurkonis out. 829

Q. Then, neither you nor Yurkonis' helper, nor your helper took the canvas back and hung up a part of it, or did anything with it? A. No, I had no knowledge of the canvas.

Q. The piece you carried him out on was the full 16 feet? A. Well, I couldn't say to that; it was a piece of canvas taken from the face of Yurkonis' place.

Q. Did you cut it in two? A. Not that I remember.

By Mr. O'Neill:

Q. You remember it as you told it when you testified you took the whole piece of canvas? A. I took a piece that was lying at the end of the brattice and laid him on it till the stretcher came up. 830

By the Foreman:

Q. Didn't you say yesterday that you doubled the canvas up and carried him out on it? A. No, laid him on the canvas; folded the canvas up, and laid him on to it.

ANICET STRIMAITIS, recalled.

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By Mr. O'Neill:

Q. It has been claimed here that a man could only be knocked down once by a lighting of gas. Tell us what experience you have had with it? A. They could be knocked down once, twice, or more with the same explosion of gas.

Q. Have you been knocked down twice with the same explosion of gas? A. Yes, sir.

Q. In other words, the position of the gas is not

832 certain and distinct; is that correct? A. Yes, sir.

Q. And when it explodes it also may have the pressure back from the wall? A. Generally, when you light the gas a couple of steps from your vein the flame goes into the vein, and is forced back again and is liable to knock you down a second time, the same explosion, in that way, and it is generally what it does.

Cross examined by Mr. Thomsen:

Q. Do you mean to say that you have been knocked down that way, yourself? A. Yes, sir.

833 Q. How many times in your experience, have you been knocked down that way? A. I was in—

Q. How many times, once, twice or three times? A. Once.

Q. Once in your lifetime? A. Yes.

Q. You were knocked down by an explosion of gas and you got up and were again knocked down by the same explosion? A. Yes, sir.

Plaintiff Rests.

Testimony Closed.

Mr. Thomsen: The defendant moves that the plaintiff's complaint be dismissed and also moves for the direction of a verdict on behalf of the defendant on all the grounds specified in the defendant's previous motion for the same purpose, which was made at the close of the plaintiff's evidence.

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I also move, on the further ground, at this time that the evidence now shows that the plaintiff commenced an action against the defendant on the seventh day of May, 1913, basing the defendant's liability in its pleadings as measured by the statutory laws of the State of Pennsylvania, and as measured by the Common Law of the State of Pennsylvania; that thereafter on the seventeenth day of October, 1913, the plaintiff served an amended complaint, and changed the measure of the defendant's liability from those prescribed by the Pennsylvania Laws referred to, adopting as a measure the Federal Employer's Liability Act; that the amended complaint changed from one cause of action to another, and that claim was made more than two years after the cause of action arose. The plaintiff was injured July 6, 1911. The amended complaint was served October 17, 1913; more than two years had expired when that amended complaint was made.

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That it now appears in the case that at the time the plaintiff was injured the Federal Act did apply to him, and the statute, having required that he seek his remedy under the Federal Act within two years after his cause of action arose, he having failed to do it, no matter what the evidence may be in reference to the accident itself, or any negligence of the defendant, the plaintiff cannot recover on that account.

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The Court: I will excuse the jury and you may argue the motion.

838 Jury excused till tomorrow, April 3, 1914, at 10:00 A. M.

Case resumed with counsel and jury present.

The Court: The point has been raised that the Federal Statute, Chapter 149 of the Laws of 1908, as amended by Chapter 143 of the Laws of 1910 (being 35 Statutes, p. 65, and 36 Statutes, p. 291), give an exclusive right to recover for certain acts of neglect when the neglect is the act of a carrier engaged at the time in some operation which is a part of its interstate commerce business; and that by Section 6, as originally enacted, and as amended, such action must be started within two years after the cause of action accrues.

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It was held in the case of the Michigan Central Railroad against Vreeland, 227 U. S., page 59, that the cause of action referred to in this statute was one given by the statute, and beginning at the time of the accident, unless death ensued. Therefore, the cause of action in the present instance began upon the sixth day of July, 1911, and two years had expired before the second day of October, 1913, when the amended complaint was verified.

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It has been held in the case of the Union Pacific Railway against Wyler, 154 U. S., 285, with respect to a different statute, but under exactly the same relation of circumstances, that a departure in pleading, as instanced by the change of cause of action from a Federal statute relating to liability to a State statute, giving a right of action upon the same subject, is such an abandonment of the old suit, and is so nearly the equivalent of a new suit that, the end of that period by which the Statute of Limitations is measured shall be considered with reference to the amended pleading, and that the service of an amended pleading subsequent to the time specified in the Federal statute enables the defendant to plead

the Statute of Limitations as against the new 841
cause of action.

The answer to the amended complaint in the present suit sets up the defence that more than two years elapsed before the interposition of the cause of action based upon the Federal Statute.

The defence, therefore, of the Statute of Limitations, having been interposed and the testimony offering no controversy, it is impossible to leave to the jury any question under the Federal Statute if the act involved in the present case was one in the course of interstate commerce within the decisions as to the meaning of that term.

In the case of *Pedersen v. D., L. & W.*, 229 U. S., 146, it has been held that the true test is, "Is the work in question a part of the interstate commerce in which the carriers engage?" citing a number of cases on page 152 of the opinion. The opinion goes on to say: 842

"Of course we are not here concerned with the construction of tracks, bridges, engines or cars, which have not as yet become instrumentalities in such commerce"

and I know of no case that has determined whether the mining of coal as the production of a separate commodity for the use of the railroad is a part of its interstate commerce activity, or whether it would be like an operation of a locomotive plant or a bridge works by which the line could be clearly drawn between the interstate commerce operations and the preparation of material by the railroad, rather than its purchase in the open market. But if the act is within the scope of interstate commerce then the defence of the Statute of Limitations seems to be good. 843

If the act is not within the scope of interstate commerce then we have the same situation as we

844 have when the Federal Employers' Liability Act is taken out of the case.

I shall, therefore, not attempt to discriminate, or to make a decision upon whether the question of this particular mining of coal was interstate commerce, and shall withdraw the issue, under the Federal Employers' Liability law, from the jury, on the ground that there is no evidence, or no issue to leave to them as to that question.

845 Now, as to the second proposition, namely, whether the Federal Act is exclusive in the sense that no other liability can attach. I think the motion of the defendant should be denied. Wherever a case is brought under the Federal Statutes, where the operations of the road are subject to interstate commerce and liability is given for certain acts, which liability is greater than certain specific liabilities or responsibilities that may exist at the same time, I find no decision that makes one conflict with the other, unless the U. S. statute in a particular case supersedes the State Statute. The language of Chapter 149 of the Act of 1908, as amended, is that:

846 "The action may be brought in the Circuit Court of the United States (now the District Court of the United States), in the district where the defendant resides, or in which the cause of action arose, or in which the defendant may be doing business at the time of commencing the action."

It also says:

"The jurisdiction of the Courts of the United States shall be concurrent with that of the Courts of the several States under the statute in question,"

and that no case shall be removed to the United

States Court, removal being a privilege that is given to the defendant in certain cases.

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Under that statute, concurrent jurisdiction being given to the State Courts, and the State Courts being compelled to apply the Federal Statute where the Federal Statute confers some right upon the litigants, it would seem to follow that if the right is not conferred, or has been lost by failure to claim it within the statutory period, then the rights which the plaintiff would have in the State Court would be in existence, not affected by the Federal Statute, and only affected by whatever regulation there might be as to interstate commerce.

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In the present case there is nothing that precludes the consideration of the responsibilities of the parties as existing under the Laws of the State of Pennsylvania, and inasmuch as this case has been removed from the State Court and is being tried in the United States District Court because of diversity of citizenship, this Court is bound to apply the laws of the State of Pennsylvania as modified or controlled by the established principles of law in the Federal Courts, and that leaves us with the United States Employers' Liability law out of the case, as if that cause of action had not been pleaded.

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The fact that the Federal Statute could have been invoked made the application of that statute exclusive until the right had been lost. *Payne v. N. Y. Central and Western Railroad Company*, 201 N. Y., page 436, sets forth an extended argument as to the relations of parties where a superior or superseding statute cannot be relied upon by the plaintiff; and, without attempting to discuss that question, I will merely refer to the case, because, in the present instance, it seems to me that the right and the authority which did super-

850 sede having been voluntarily relinquished, we are substantially in the situation presented by the Payne case.

Mr. Thomsen: That ruling by the Court includes the statement that if the statute is exclusive while it is in force, that the words of the statute which require the action to be begun within two years is no protection to the defendant company, excepting as against the extended liability which is in the act over and above the other act.

851 The Court: The statute is in derogation of the common law. It means, taking it strictly, that during the period of two years he is given a cause of action which will supersede other causes of action that might bring the Federal and State laws in conflict; that if that cause of action is lost then, whether or not he still is given rights by the State law would be unaffected by the Federal legislation.

852 Mr. Thomsen: I will say that, as I understand the law, the Federal Act is a regulation of commerce. It has got to be so to be constitutional. It is not like State liability acts or like common law in reference to negligence actions on that account. It has its roots in a different soil; that the authority of Congress to regulate commerce under that Act is extended to the persons of the employees—it says to both masters and servants in interstate commerce, “We set down this regulation for you. We define both the masters’ and the servants’ rights.” We say to the master, “You are liable for such and such things;” we say to the servants, “You must commence your action against the defendant within two years, or else you lose the right of action.” The defendant is just as much entitled to have his right protected as the plaintiff has the right to commence his action prior to that time, and demand the wide extension of liability which the act gives him.

The Court: I entirely agree with you. If the statute in question defines some mode of operation of the railroad which conflicted with the State Statutes, and if thereby some difficulty were created in the enforcement of the State Statute, the Federal law (provided it were with relation to interstate commerce) would be superior, and then the action might be limited. The only action that could be brought would have to be the one that grew out of the operation of the Federal law. But that isn't this case. Here, the liability statute merely gives, as against the defendant, an extension of a further right to bring a suit. If that is lost, the defendant gains the benefit of the cessation of the right. I do not see that that supersedes the question as to whether the defendant must litigate some liability that is present under other statutes, or under the law generally that is not affected by the Federal Statute. 853

Mr. Thomsen: The question of the interstate carrier being under the regulation of Congress goes to every part of the business of the carrier, and to every department of it, and to its whole life, its whole circulation and life. That means that the finances of the company, its financial condition, its resources, everything, is under the authority of Congress, and that they have a right to say and to lay down rules as to how this carrier shall be affected. If the question of liability which is put over by States is even more extensive or is more applicable in a certain case than the Federal Act because of that individual case, penalty would be imposed on the carrier under those conditions under a State Act. If the employees having the right to recover a large amount of money under the State Act would purposely allow the Federal Act to expire by limitation, and then commence under the State Statute another action, and say that they had 854

- 856 a right to do that and still recover a penalty which the State would enforce under the ruling of this Court. The only defence of that would be that it would be imposing too great a burden on the carrier, and might be enjoined in the United States Court as having to be such a large judgment as to be a burden on interstate commerce. Now, I think that Congress has interposed, and says if it is going to be done it has got to be done in two years. So I think that as I read the law, this is exclusive, and that Congress intended to protect the carrier from an undue drain upon its financial resources. We have seen that right in the Western States. It is all intermingled.
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The Court: As to the present matter it is easy enough to see that if the railroad company organized a separate corporation to mine and sell its coal, the distinction would be more simple than when the railroad company is mining its own coal. On the facts of the present case, the mining of coal for the general operation of the railroad, where there is no possibility of distinguishing the use of the coal as between interstate or intrastate commerce, and the fact that the coal is almost as directly put into use as the labor of the men in maintaining the track on these facts, it would seem that, in the absence of particular evidence, separating the work of the mine as a whole, from any interstate activity, that the facts in this case would fall within the powers of Congress to regulate. But whether or not the Supreme Court would hold that the Employers' Liability Statute is a regulation of commerce in the sense that it has taken away from the States all power of specifying or creating liability even in cases where the benefit of the Federal Law would not be given, is something that I think is going further than any of the cases that have been decided, and it isn't necessary to apply the

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same rule as would be applied where the State is attempting to conflict with the Federal Statute. The cases that have just been referred to are ones where the State Statute is in conflict and not where the State Statute establishes rights that are entirely concurrent and can be enforced to the extent of allowing the rights of the parties to be tested in a law suit to have the question of whether there is or is not negligence, Congress has not seen fit to legislate on the subject.

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Mr. Thomsen: I want to use this illustration to follow it up. As I understand it the exclusion of this Federal Act is this: That if a State like the State of New York should pass a law that was word for word just like the Federal Employers' Liability Act so far as the extent of liability was concerned, and nevertheless except the statutory limitations—instead of making it two years like the Federal Act we would make it five, six, eight or ten years. The employee then having lost his right, having been injured in Interstate Commerce and having lost his right to prosecute under the Federal Act because of the expiration of time to commence such an action against the Interstate carrier, four, five, six, seven, eight or ten years, that he would have a perfect right to recover. That is the way I understand this rule.

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The Court: I can't see how a State statute would be allowed to repeal a statute of limitation fixed by Congress, any more than a State statute could be allowed to repeal a certain kind of liability or to repeal a regulation; but where the Federal statute gives an additional right (that is, different from the right which exists under the State statute), then the statute of limitations as to each would govern its operation, and if a Federal law creates a certain privilege or right limited to two years and a lesser right is given by the State statute for five

862 years then it doesn't seem to me that the Federal legislation would interfere with the exercise of that lesser right during the three years after the Federal statute had run. Now, whether you would draw the statute line as to a particular statute one way or the other is another question. In the present case I think that the two are consistent and that it is only the increased right which has been given for the space of two years by the Federal statute.

863 Mr. Yankaus: I wish to reopen the case to make a motion as to Paragraph 3 and Paragraph 5 of the amended complaint and move that they be stricken out, and that the action under Interstate Commerce also be stricken out.

Mr. Thomsen: He moves to amend the pleadings by making them differ from the proof. We have both conceded that they were engaged in interstate commerce.

864 The Court: The plaintiff has not asked to withdraw a special cause of action from the total or to withdraw any items of damage. If that were the situation I should grant the motion at any time up to the time the case goes to the jury; but he has rather asked that where one recovery is based upon two grounds of liability, that he be allowed to withdraw any claim upon one of those grounds, it having already appeared in the record that argument at least may be had as to whether the enforcement of liability upon one ground would defeat that upon the other. Inasmuch as I have already ruled that the particular ground of liability has been lost to the plaintiff and that he is prescribed from urging it, but that the action may continue without reference to that, I will deny the motion; it being apparent that if I should grant his motion the case would be left in exactly the same situation; there-

fore it would have no effect upon the case going to the jury. It is entirely a matter of law.

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Plaintiff excepts.

The Court: Now, as to the other question upon the Liability Pennsylvania Statute and upon the testimony, I think it is entirely a question of fact and will let the question go to the jury to determine. We must have their verdict upon the facts; and in doing that, of course the jury will understand that I have no desire to express an opinion one way or the other.

Mr. Thomsen: Defendant excepts to the denial of my motion on each separate ground, and particularly on this ground as to the exclusiveness of an interstate act and its application.

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The Court: In order to save you time in summing up I will indicate that I shall charge the jury that the question of fact has to do with the maintenance of the place in which Yurkonis was working, as to whether or not there was negligence in protecting him from the presence of gas which he would not detect when careful as to his own operation; that is, I shall charge the jury that if the accident happened through any neglect on Yurkonis' part in the way he set off the blast, or any act on his part that he did not comply with the mining laws, or any act of the statutory public officers as to something that they are responsible for to the State, that they will not be left to the jury, but you can confine your summing up right to the one question whether or not there was negligence in the ventilation for protection against gas.

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I want the jury to understand that the application of these mining laws, the question of an accident occurring through an explosion raises question enough, and presents a serious issue enough so that the case had to be tried carefully, even though the facts themselves might have come down to a much simpler issue than they have. The

868 severity of the injuries and the fact that this Federal Statute has been brought in, the whole matter makes it in my opinion entirely proper and justifiable for Mr. Thomsen and Mr. O'Neill to go into the case with the greatest particularity, and I do not think there is any need of either of them defending themselves and apologizing to you for the time it has taken or the difficulty we have had. Of course they can explain to you what that difficulty is, but I want to take away from them the impression that the jury might think that they had been overestimating the burden that was on them. I think the case entirely justifies the way the questions have been raised.

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Counsel summed up the case.

Adjourned for recess till 2:45, P. M.

Charge to the Jury.

Brooklyn, April 3, 1914.

870 CHATFIELD, J.: Gentlemen of the Jury, I shall, in a few moments, bring you back to the proposition that the determination of what occurred on this 6th day of July, 1911, is the first question of fact that you have to consider, and the next, that after you have made up your minds so as to find the facts, you will have to consider what bearing those facts had upon the rights of the plaintiff to recover.

I speak of that at the outset because many of the matters are not disputed. Some of the circumstances and of the physical facts and the situation in the mine are disputed, and the question of just how the blast was set off, and just what caused the injury to the plaintiff is not only disputed, but there was no one there except the plaintiff himself,

and so the determination of the facts is preliminary to considering who was to blame.

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As to the matter (from the standpoint of a case in which a question of fact is involved), I need only charge you that if the plaintiff is required to prove his case, as you know he must be required, that means that he has to show some testimony, has to prove whatever case is necessary, and therefore, has to present testimony that proves something.

You, as the jury, have to weigh that testimony, because with you rests whatever you find has been proven.

The plaintiff has to furnish testimony, therefore, which proves something which you believe and he has to furnish credible testimony enough to make out the necessities of a cause of action of the sort that is stated in this case.

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The plaintiff has called one or two witnesses besides himself. The defendant has called a great many more witnesses in number, and you can judge from that, and I charge you that the belief which you have on the testimony is again a question of fact. The worth of the testimony rests with you, and you must judge it from that standpoint; and neither the number of words or the number of witnesses or the quantity of testimony, of itself, will decide for you what you do believe.

If any witness wilfully says something that is not true about something that is material, no matter how much else he has testified to, you can believe just so much as you think you should; that is, just so much as you do believe. If a dozen witnesses have testified about one matter, and but one witness contradicts them, if you believe the one witness—that is, if one witness' testimony is worthy of more credence than the statements of the twelve witnesses—then you have got to decide the question of fact according to the worth, that is, the persua-

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874 siveness, of the testimony, when viewed as a whole. You have got to remember in scrutinizing the testimony how the people happen to be here to testify. The plaintiff is trying to make out a cause of action. He is interested, in the sense that everything he is telling about the matter is told so as to persuade the jury that he should be allowed to recover. You have got to consider two things in weighing his testimony: his recollection and his statement of facts from the standpoint of truth. When a man is injured so that he becomes unconscious, and is taken to the hospital, of course there is a blank in his recollection from the time of the injury until he becomes conscious. Whether the events immediately preceding the injury are correctly recollected, whether he testified to them accurately is something for the jury to consider.

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If you find that his memory and his recollection and his statements of them is accurate, then you must consider whether it is exact, and whether he is telling it to you as he remembers it. And so, knowing that the plaintiff is interested in the outcome, you must weigh and scrutinize his testimony so as to see just how accurate his recollection is, and just how exact he is stating it. Any of the other men connected with the case who have anything to do with the situation, or with the arrangements who might be criticized or be responsible to their superiors, or who might have any feeling that they would be blamed, should have their testimony weighed from the standpoint of their situation. They are interested in the sense that they have something to influence their feeling in the matter, even if they have no monetary interest, unless it might be a mere question of continued employment. It doesn't mean that a man cannot tell the truth if he is trying to get money by winning his suit. It doesn't mean that a man cannot tell the truth if

he might be blamed, and perhaps his employment be in jeopardy; but you have got to bear that in mind in finding whether he did, or whether any of them did, or which ones told the truth, and what was the truth at the time.

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Some of the witnesses who came from the outside have no direct interest in the matter, this man who has come here as a witness from Pennsylvania and who is holding an office, has the right, the same as any other citizen has the right, to appear anywhere that the State of Pennsylvania and his duties will let him. He has the right to be paid either his expenses or for his time if he attends as an expert, provided the State or anyone who employs him does not object, and you have the right to know the facts.

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If the man's situation or relation is such that his feelings enter into the formation of his opinion, or if he has attempted to form an opinion so that it shall favor one theory or the other, that is a question for you to consider, weighing his testimony just from the standpoint that he gives it on the stand, and scrutinizing that testimony just as you scrutinize all the other testimony, just as carefully as you can, because after you once go up to your jury room you have got to commence, as I told you at the outset, determining what were the facts.

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Assuming that upon the testimony you are going to consider, first what did happen, and then as to who was responsible for what happened, then after you determine the responsibility, consider whether the plaintiff is entitled to recover, from the general propositions that I shall refer to later, and then consider whether the plaintiff is to blame himself, so that he should not recover; if on all of that the plaintiff presents a case which, by credible testimony, is worthy of more belief or prepon-

880 derates over everything that is urged against it, then you have to take up this question of compensation for damages.

I shall not go into the injuries which the man has received. They are not disputed anywhere, nor the fact that the man was injured on this day in question down in that mine. He has lost the use of his eyes and has lost the physical part of his body which we call the eye ball. He has an injury to his hand; he has had some kind of an injury to his head of which they told you, and you have seen the scar. He has had fractures of the leg bone, and one of his legs is in the condition that you have seen; there is no dispute of the fact that it was the result of what happened down in that No. 6 crosscut at the time referred to.

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You have the testimony that he was 46 years old a little while before this accident, and was married; I think he is 50 now. You have the testimony that when he was 47 he had been earning for some 18 years what he averaged at \$900 a year. You know how long he has been in the country, what employment he had been able to find for a period of over 20 years; you have seen him, as far as his size and appearance and general physical health is concerned; you have heard him talk, so that you know something about his education. You have had the fact stated to you that he is married, but that is only evidence in the sense of showing the circumstances under which he lived, that is, that he had a home and endeavored to take care of the family. So that you can consider it in seeing whether he was diligent, and you have had the testimony of how long he was in the hospital, and it is admitted that he suffered physical pain till these wounds had healed.

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The testimony is that since that time he has been practically free from abnormal physical ailments.

You have had the testimony that at the pres-

ent time he needs help constantly, to supply the deficiencies of his limbs and his sight.

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Now, from those facts, from the testimony that you have heard about him and what you have seen, if you come to the question of estimating the damages you would have to look to the future and also consider the time that has elapsed from the day of the injury until the present, so as to say what in money would make up a fair estimate of the injury which he received on the 6th of July, 1911. You see from July 6th, 1911, down to April 3rd, 1914, is to a certain extent capable of addition, mathematics. As you find items you can put them down and add them up. From April 13th, 1914, on into the future you not only have got to determine what the items are, but you have got to determine their duration and whether they change. You must consider the man's age, and how long he would be able to work at the same rate; whether he is likely to increase in earning capacity, or whether he is likely to decrease; whether he is likely to live; whether he is likely to keep employment. You have got to take into account the fact that the injuries are permanent and what situation that puts him in, so that his earning capacity would be taken into account and the loss of it would be taken into account, and any necessary expenses which in the ordinary case would be like medicine, or a doctor's services, but in the case of a man like this would be those expenses that he would be put to beyond those which he would have if he were merely idle and paying for the things he would pay for out of his own earning capacity.

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Having estimated all those items, then it would be a question of totalling them and figuring what would be a fair money compensation, viewing it from the standpoint that you have today, both as to the past and the future; a fair compensation for

886 what injury the man suffered on the 6th of July, 1911, to his earning capacity and to him, in the way of actual physical suffering.

With that, I am going to leave the question of damages, again impressing upon you that you have nothing to do with it unless you find, on the whole case, that the man is entitled to a verdict in the sense that I charge you in other parts of the charge.

Now let me come back to the things that are not disputed, and to these matters of law that have been referred to.

887 The accident occurred in the State of Pennsylvania. Mining operations in an anthracite mine must be conducted in Pennsylvania according to the laws of that State. If the operations are directly a part of the business which is going on with citizens of other States, so that the Federal Government has an interest in the way people in one State do business with those in another, and therefore Interstate Commerce is involved, the Federal Government might have some power of regulation. That has been referred to, and you heard me rule this morning that, under the circumstances of this particular question, we can leave out of consideration, so far as your verdict is concerned, the laws which might apply to a railroad that is mining its own coal to run its trains across the State line and carry passengers or export freight. So we just leave the interstate commerce matter out of the case.

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Looking at it from the standpoint of the laws of Pennsylvania, there are two statutes or two sets of statutes to take into account. The first is, as I said, that the mining laws of the State apply. A great many of those have been read to you. You may have the language of these different sections, if a question arises as to that, and you will have

to bear in mind that any miner who wishes to take a helper and go down into one of these mines and dig out coal and put it in a car and carry it out to the surface and be paid so much a cubic yard or ton, must go to the State of Pennsylvania, pass an examination, and show that he is competent to dig coal, to conduct himself properly in a mine, to handle dynamite, and drill holes, and put in explosives, and set them off, and protect the lives of himself and the man who is helping him, and to protect the mine and the surrounding property.

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What the qualifications may be, or how much experience he may have we need not consider now. Such a man may go and hire himself out in a coal mine and he then will be given the right to go in there and dig coal and, having that certificate from the State, he must dig the coal so as to respect the State laws. If he has an open light within 5 feet of the explosive, if he doesn't handle the explosive properly, if he takes a steel bar and starts to drive dynamite or tamp it into the hole, then he is violating the duty that is put on him by the laws of the State, and violating the obligation which he undertook when he got that certificate. You can see that the coal mine is not responsible for a man who does not do, in a proper manner what the laws of the State put upon him, and where the men operating and running the coal mine do not compel him to break the law.

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So that if Yurkonis injured himself or his helper or some of the men in the mine by being careless the same as if he took a knife and ran around sticking it into some one, it would not be the fault of the defendant who owned the coal mine.

And so, if Yurkonis set off a blast and injured himself by trying to light the squib with his lamp, or if he was careless in handling the squib so that it was his own fault, then the company would not

892 be to blame, and as long as he was the person who was hurt, and his own fault in such a matter as that caused the accident, it would be contributory negligence, and he cannot recover.

So when you come to find these facts and consider whether he has a right to a verdict in this case, you must make up your minds whether he shows, upon the whole case as it now stands, that he was not careless himself with respect to something which he should have been careful about, or which was required of him by the laws of the State and which was the cause of the accident, or if he was careless about something as to which if he had not been careless the accident would not have happened.

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That covers the question of contributory negligence.

To go back to these mining laws again for a moment: There are a lot of statutes which we need not consider, as to how they shall sink these shafts in mining; there are a great many of these statutes as to how the chambers shall be set to separate the shaft, and as to how the slopes shall be run, and as to the way the buildings shall be built around the slope of the mine, and as to the way the coal itself shall be handled, as to where the rules shall be posted; there are things of that sort that you do not need to consider in this case, but which are all included in making up these many sections of which a few I have read to you. As to the fires, you have heard the testimony of the danger from the explosion of gas; you have heard the section read to you by which the mine foreman, whoever is in charge of the mine, shall appoint somebody that is called a fire boss to shut off, protect any part of the mine in which an explosion has occurred, or where there is gas, so that it would not be safe to go in there. You have heard the testi-

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mony as to what qualifications a fire boss has to have, and that he has registered himself so as to be eligible. You have also had the sections read to you as to the necessity of there being some one in charge of the mine who shall be called the mine foreman, or the assistant mine foreman if the mine foreman isn't there. Those men have to pass an examination in the State of Pennsylvania, so as to qualify to hold those positions. They have certain duties that are prescribed by the State of Pennsylvania. They are compelled, at least every other day, to visit all parts of this mine. They are compelled by the statute, to go to the place where the men are going to be at work, at least three hours before the men get there in the morning, and to make an inspection to see if there is gas present within that time. Their superintendents are required, once in so often, to visit the entire property and see that everything, the elevators, and breasts and these different parts of the mine are in safe order. This obligation is put on the mine foreman (who is licensed by the State), to see that the State law is obeyed; to see that explosions are set off only in accordance with the State law; to see that the ventilating apparatus is kept in proper order, and that it is operated properly, and that the mine is made safe, so far as these streams of air going through the mine are concerned. Then the State, having put upon this man called the mine foreman the obligation to see that lives are protected and having provided a penalty in case he does not do his duty—then the State law says that inasmuch as the mine foreman can insist on the State law being observed and obeyed, whether or not the President of the Coal Company might come and tell the workman to violate the law, that the State will hold the mine foreman responsible for seeing that the statute is observed, and then that

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898 if something occurs because the mine foreman has failed to obey the law, the failure upon the part of the mine owner or of the superintendent of the mine, or the company that is operating the mine to do something which was directly controlled by the mine foreman, should not make the mine owner liable; and it has been held in one of the Pennsylvania cases that the law would be unconstitutional if the property of the mine owners were taken away because of the fault of one of these men who is licensed by the State and is compelled by the State law to perform certain duties, and to see to them. In other words, the mine foreman is put on the same basis as the contract miner. If the mine foreman goes down and sees that there is gas in a certain place and doesn't obey the law, and injury happens because the mine foreman is careless, then, under the mining law it has been held unconstitutional to hold the mine owner responsible for the failure of the mine foreman to do his duty.

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Then comes what is known as the Employers' Liability Law of Pennsylvania, which is general in its language, and as to which there has been some differences of decisions, as to just which of these mining laws it applied to and which it did not.

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It has been held that it does not apply to some of the provisions of the mining law. But it is in the books of Pennsylvania, and the Courts have upheld the Employers' Liability Law to the extent of deciding that if a person placed in charge of a mine (whether he be a superintendent or a mine foreman), fails to furnish a reasonably safe place to work, or fails to keep the property of the company and to perform the operations of the company in such a way as to give the men a safe place to work in, then, in so far as he is representing the

company in doing that, the Employers' Liability Law does apply.

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On the other hand, if the same man happens to be superintendent or mine foreman, and he is careless as to something that is a part of his statutory duty, and not something that the company makes him do there, the Employers' Liability Law, as I understand it, does not apply, and he is in the category that I have defined before.

This Employers' Liability law provides that in actions to recover for injury, "the negligence of a fellow servant of the employee shall not be a defence, where the injury was caused or contributed to by any of the following causes, namely:"

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"Any defect in the works, plant or machinery, of which the employer could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman or any other person in charge or control of the works, plant or machinery."

And then:

"The negligence of any person in charge of or directing the particular work in which the employee was engaged at the time of the injury or death; the negligence of any person to whose orders the employe was bound to conform, and did conform, and, by reason of his having conformed thereto, the injury or death resulted; the act of any fellow servant, done in obedience to the rules, instructions, or orders given by the employer, or any other person who has authority to direct the doing of said act.

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"The manager, superintendent, foreman or other person in charge or control of the works, or any part of the works, shall,

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under this act, be held as the agent of the employer, in all suits for damages for death or injury suffered by employees."

Now, as I have said, that statute is applicable to the activities, the operation, of the company in so far as they are acting through some one who is not merely performing the statutory duties that the law puts on him as an individual. It is in derogation of the common law under which these men are all working, and by which if one man was injured through the fault of another there could be no recovery.

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So that the effect of this statute is that if the company is negligent through the act of some one who was in charge of or superintending or compelling the obedience of the workmen in carrying out the operations of the company itself, then the mere fact that they are all working for the same company will not be a defence and there shall be liability for the failure of the company to perform its duty through agents or servants of that nature, unless it comes down to the individual action to which I have already referred, as the statutory obligations and the performance of statutory duties by some one man, so that his act is concerned, and not that of the employer.

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I have said that the defendant, that is, the mine company, was bound to furnish a reasonably safe place to work; this mining company or a superintendent who was in charge of this, as well as of other collieries. It had a mine foreman upon the place who, under that superintendent or manager, was in charge of this particular colliery, and everything that the defendant as a corporation did there had to be done through one of those men. In so far as they performed their own operations, maintained their mine, they were

bound to maintain it according to law with respect to the statutes, and they were bound to maintain it so that it should be reasonably safe for the men to go to work and to continue their work. In so far as the foreman of the mine or his assistant was compelled to inspect the ventilation and to see that the ventilation was properly accomplished on the day in question, the work was that of the mine foreman, which he was bound to do, by law; and there is immediately suggested the necessities of the arrangement of these different appliances for ventilation and the arrangement of the parts of that mine.

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You have heard that there were men sent down there to build these partitions that are called brattices; that one of the sections, this Section 15, provides:

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"The quantities of air in circulation shall be ascertained with an anemometer or other efficient instrument; such measurements shall be made by the inside foreman or his assistant."

That is, the statutory officer provided by the State law that that man must make the measurements. If the accident happens because he didn't make the measurements he would be responsible, unless the superintendent of the mine, or the company, had prevented his making them, or made themselves responsible for him, if he didn't make them. He must make these measurements,

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"at or near the face of each gangway and at the nearest cross-heading to the face of the inside and outside chamber or breast where men are employed."

Then comes this clause:

"The headings shall not be driven more

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than sixty (60) feet from the face of each chamber or breast and shall be entered in the colliery report book."

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We have nothing to do with the way Pennsylvania construes that section. It is not a question of their keeping their reports; if the Pennsylvania statute was so poorly drawn or printed as to the way the report should be entered, so that they actually ordered them to report the driving of headings, we will not concern ourselves with that. It is evidently a poorly worded section, in some respects. But the important thing is that the headings are not to be driven more than 60 feet from the face of each chamber or breast.

Mr. Davis has told you that he interprets that to mean that the space along which one of these brattices would be carried, the pillar of coal between the cross cuts, shall at no time be more than 60 feet between the place where the men are working and the next cross cut; and then again that would be true between that cross cut and the one back of it where they keep a temporary partition.

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There are other sections of this law respecting the building of those brattices and the maintenance of proper props. The mine is required to make these permanent partitions of concrete or fire-proofing material, brick, except where a mere temporary partition is used.

You have heard the testimony that there must be a temporary partition maintained while another cross cut is being dug; that for safety they have to have two openings, not only into the different sides of this particular pillar coal, but two ways of getting at the locality in case of fire; that all these temporary partitions shall be made of brick, or material that can be taken down easily, or if

it should be made of wood, with a door, or planks that can be pulled down easily is not a requirement of the statute, but it is a question to consider whether or not negligence is shown by the structure in the form that it actually existed. 913

You have had testimony that a current of air is conducted, not into, but out of the mine by this large fan, so as to cause a movement of air to pass from the place where the work is being carried on, or where the miners are allowed to be. The statute requires a circulation of air so as to remove any harmful gas from the face of any working place, or breast, where work is being carried on; and that the brattice must be so arranged that that shall be accomplished. 914

If the mine foreman is at fault in not seeing that there is a circulation of air through the proper place his act in not doing that would not be that of the company, but would be his failure to perform his statutory duty. But if the mine foreman is representing the company, or if there is a superintendent or other person that is maintaining the mine, and if they have charge of the works, and if they inspect, and know of them in such a way that they are maintaining an unsafe place which the mine foreman also fails to correct at the time, then, if the accident is the result of the acts of the company through its superintendent and not simply of the failure on the part of the mine foreman to correct the situation, then it would come under the liability law and the defendant would not have performed its duty. 915

Now, this fan sucks the air from the mine. You have heard the testimony that several of these gangways are a thousand feet or more in length; you have had the testimony that the air is conducted from the entrance by these various passages, by the different paths through the mine and

916 around to where the fan is pulling it. If the current of air is pulled with sufficient strength, at a sufficient velocity to draw the air from the entrance of the mine all the way through the workings and around so as to take it out at the exit where the fan is, you can see that the mere question of moving that air ten or twelve feet further is not, of itself, to be made a point of dispute. If the fan can pull the air all through the mine through as many workings as they may have, we need not worry about its ability to move it 72 feet or 60 feet along any particular gangway. That is not the question.

917 Again, if the suction of air is sufficient to pull the air down Yurkonis's gangway, as it has been expressed, you need not stop to consider whether it would pull it through the fourth and fifth cross cuts, or whether it would pull it through one cross cut, or more. The force of the air would be sufficient if the fan is working (and there isn't any testimony to indicate that it stopped), so as to create a suction that would go wherever the arrangement of the fan was such as to make the current of air work.

918 But the question that is raised in the case is whether or not that current of air was so directed and so manipulated and handled in this particular locality that it swept past the face of the place where the man was working, so as to remove the gas from that point. There is some testimony to indicate that the partition in the 4th crosscut (that is, the one through which the air would have the shortest means of escape), was injured by blasts from time to time. You have heard the testimony that for a certain period some of the planks at the upper part of this partition were loose, and that there were holes at the sides, and that these had not been restored at the time

of the accident. You have got to consider whether that had any effect upon the maintenance of a sufficient quantity of air through the next crosscut and around the end of the brattice, so that the defect in the 4th crosscut would make no difference. Then you have got to consider whether the brattice in Yurkonis' gangway was carried far enough to take the current of air into the crosscut; and you have got to consider whether a canvas, enough to take the current of air into the crosscut (whether a canvas partition or some other partition) was used, so that the current of air would be directed down to the place where Yurkonis was working. You have heard the testimony as to the amount of slope in this channel or tunnel going down, five feet high, 12 feet wide and, as Yurkonis estimated it, 36 feet long, and as the witnesses said they found it after the accident, 21 feet long, and you will have to consider its location and relation to the cross cut upon the other side which had not yet been run in to meet it; then you must consider what you find to be the facts as to whether or not there was a canvas there, whether that canvas was 16 feet in length or whether it was eight feet in length, as it was found after the accident, or whether it was not there at all, or whether it was down on the floor or up in position, or what the fact might be. You have to consider where the brattice terminated. You have heard that the lumber was taken in in 16 foot lengths and I asked whether there were four or five lengths in the brattice. You have heard them say that the sloping part at the beginning was made of eight foot lengths and by that you can see that if there were four lengths after that it would run down the gangway 64 feet, and the face of the pillar was 72 feet. If another entire 16 foot length were put on it would

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922 seem that it would have carried the brattice on
beyond the end of the property line. If but four
lengths were used it would seem that it would not
reach the entire face of the pillar. If the brattice
was made so that it was 72 feet in length from the
place where it started, remembering that a part
of the brattice—that is, for 12 feet—would be
across the mouth of the fourth crosscut—with the
sloping part it would have to go 12 feet first
and then 72 or 84 feet in all. If it was in that
sense 84 feet in all, then you would have to see
where it could be made with 16 feet lengths in
that way. You must determine where the brattice
923 terminated; then the length of this crosscut and
the amount of canvas, if you find that canvas
was present and where the canvas would have
terminated.

You have got to consider the testimony as to
the movement of any gas which might escape, the
possibility of escape, and the question of how an
explosion could occur.

You have had the testimony as to how fast the
gas would go up to the ceiling and follow along
the ceiling. You have had the testimony that gas
couldn't explode twice in the same chamber, be-
cause the fire damp or the carbonic acid gas
924 would put out the flame if there were sufficient to
cause an explosion the first time. You have had
the testimony of one of the plaintiff's witnesses
saying that an explosion could occur by the gas
being lighted from the flame, then the returning
wave of flame, or portion of the explosion from
the face of the chamber would cause a second
explosion at the point where the flame lighted
the first one, and you have the testimony of the
expert who was the inspector of mines of Penn-
sylvania, that there could be no explosion at all
under those circumstances.

Then you have got to consider the testimony of the plaintiff as to what he was doing and how he lighted these squibs. If the testimony had been that with this touch paper he tried to light the squib and then went back and tried three times to light it, you would have to consider whether or not he had had it lighted all the time, and whether he was careless in attempting to re-light it. 925

The regulation in the statute is that no man shall re-enter a chamber where a blast has failed to go off until an inspection has been made by the fire boss or by some other person.

Now, if Yurkonis had one of these pieces of paper in his hand and it failed to burn and the touch paper was damp, that might not have anything to do with the squib. On the other hand, if he tried to light the squib and the squib was damp, then the question would be whether he was negligent in attempting to light it again. You will have to take his recollection as to what he did with these three pieces of touch paper. The first two I think, he said did not work, so it was only the third one with which he touched the squib. He said the lamp was down at one side and he picked up his lamp and cap and that he was knocked down, that he was burned on the head; there being no evidence, so far as he illustrated, that there was any burning upon his face or body or hands. He says that he didn't fall down to dodge or avoid the flame, but that the flame came on top of his head and he was knocked down; that he tried to get up and went down again from another explosion of flame from overhead, and that then, as that whirled him around so that he was facing the place where the charge of powder was coming out of this hole, there was the explosion and the charge of powder 926 927

928 and coal struck him in the face causing the injuries, which are not denied.

So that on his own testimony the only locality as to which there is dispute as to the matter of burning is apparently on top of his head.

Now, that being the situation, leaving the recollection of the testimony as it has been given, to you, gentlemen, you have got to see whether the plaintiff has shown by a preponderance of testimony that you believe, that the accident was caused by some failure on the part of the mine, acting through either the superintendent or the mine foreman doing the superintendent's work, to
929 construct or maintain the place where the plaintiff was working in a reasonably safe manner so that he would be protected in performing the ordinary operations of mining in a proper way.

The witnesses have told you that the reason they put this crosscut at this place was because it was the eastern boundary of the property, and instead of making one cutting 24 feet wide or making two cuttings at a shorter distance, and thereby getting involved in the question of having the support insufficient, they made this one cutting just the width of the cutting itself, beyond where it would naturally be. In other words they
930 had 60 feet of pillar and then 12 feet more and then 12 feet of cutting.

As I have said to you, it isn't a question whether they could conduct the air that far, but if conducting the air that far there would be a proper circulation, and if whether if there was not a proper circulation it would allow the collection of gas, whether the defendant, through its officers or agents was bound to consider that there might be a collection of gas and whether reasonable precaution, reasonable diligence in anticipating what might happen would have required a different ar-

rangement and avoidance of the construction and maintenance of the place in the way in which the company did construct and maintain and keep it—if you find that it was not in a proper condition, whether it was in that condition for such a period under such circumstances that it was the act of the people controlling the mine, and not simply the negligence of the foreman in failing to appreciate that particular morning or at the visit immediately before, that the condition was then unsafe.

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If you find that the plaintiff maintains the burden of proof and satisfies you, to the extent that I have charged, that the defendant was negligent as to something that it should have anticipated and provided for and should have realized would be dangerous in the way that I have charged, and if they failed to avoid that danger or to use the precautions that would be necessary to make the place safe, and if the plaintiff also satisfies you to the same extent, by testimony that you believe, that the accident did not occur through his own carelessness, then consider what would compensate him in the way that I charged you at the outset. If he furnishes proof to that extent then render your verdict for the plaintiff.

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If he does not so satisfy you, if the facts show that there was nothing unsafe there and that the accident was from some sudden outburst of gas that could not reasonably have been anticipated to be dangerous from the arrangement of the place, or if the accident occurred because the plaintiff himself was at fault, or if you are not satisfied so as to be able to find what the facts were, then your verdict should be for the defendant.

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The Court: You may have an exception to all these matters, if you refer to them specifically. I will allow you an exception to each part of the

984 charge that you refer to, so that it can be identified with respect to the Pennsylvania statute and the question of responsibility.

Mr. Thomsen: The first exception which I wish to note to your Honor's charge is the statement to the jury that you are leaving out and instructing them to leave out anything as to interstate commerce matters.

Same ruling as before.

985 Mr. Thomsen: I take an exception to the charge of the Court in so far as it has referred or applied to the statutes of the State of Pennsylvania or the common law to the case; in so far as those statutes are measures of the liability of the defendant. I except to the charge of the Court that under all the circumstances of the case and the proof made by the plaintiff and the defendant, and all the evidence, that the defective partition or the lack of the extension of the brattice or the lack of canvas, or the distance between the working place of the plaintiff and the next open space behind it, was any proof of negligence, in and of itself.

986 The Court: I will give you an exception, and I also want to warn the jury that the mere fact that the distance was prescribed by statute is not of itself conclusive on the question of negligence, one way or the other. If it didn't cause any accident we are not concerned as to whether the Pennsylvania law might do one thing or another. In the same way, wherever anything is prescribed by the statute you are to consider whether it did cause the accident or whether there was negligence, and not whether the inspector might have made them do it over.

Mr. Thomsen: These things in and of themselves alone, are not evidence of negligence, unless they relate to the cause of the accident.

The Court: Unless the jury find that they were the cause of the accident.

Mr. Thomsen : Then I do not except to the charge as now made by the Court. 987

Plaintiff excepts.

Mr. Thomsen : I except to the charge of the Court in its leaving the question to the jury as to the possibility of a gas explosion, under all the evidence in the case.

The Court : It is for the jury to pass on.

Defendant excepts.

Mr. Thomsen : I except to the charge of the Court in reference to that same proposition as to the possibility of explosion and injury as testified to by the plaintiff, based on the physical conditions and the evidence in relation to the actual properties of the gas on the ground that there is no issue of fact as to those propositions. The only evidence in the case is that gas acts in these certain ways and precludes the possibility of one explosion or two. 988

I except to your Honor's charge in leaving the question to the jury as to the proper conduct of the master or any employee representing him, in relation to the inspection of the ventilating facilities; and as to their responsibilities after such inspection, as to their notice of any defect, upon which any duty towards the plaintiff could be based, because the entire evidence shows, without any dispute, that the ventilating apparatus—no matter what its condition—was working properly all day the day of the accident up to the very moment of the accident, or within a moment or two prior thereto, and that that being the case, that there was no notice to the master and it could not have discovered upon any inspection that had been made that it had any duty to perform. 989

I except to the charge of the Court in its references to the duty of the master upon the particular occasion of the accident, so far as it had any duty to make the working place of the plaintiff

940 reasonably safe, on the ground that the duty had not accrued, because of the evidence and the circumstances.

I except to the charge of the Court under the evidence in its reference to a statement that the outburst of gas, as an explosion of such an outburst of gas which couldn't be taken care of by the ventilating apparatus as shown, whatever its condition may have been, had nothing to do with this case because of its impossibility on account of the condition of the plaintiff; that the dimensions of the chamber, in other words, that an extraordinary accumulation of gas unforeseen could not have exploded; otherwise it would have absolutely
941 burned up the plaintiff, under the evidence. His physical condition must have shown it.

The Court: As I remember his testimony was that he did light the squib, so that the explosion did not light the squib.

Mr. Thomsen: No.

Mr. O'Neill: He did light the squib, but only a few seconds before the explosion.

The Court: The explosion was so close to the time when the squib went off that the ordinary time for the squib had not expired.

Mr. Thomsen: I also have some requests to charge which I must apologize for, to a certain extent, because these requests were made out before the end of the trial in anticipation of their being necessary to the defendant's side of the case, and I have added to them in pencil.
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Mr. O'Neill: I ask your Honor that Mr. Thomsen read the requests.

The Court (reading the first request): "First. That there is no evidence in the case upon which the jury can find as a fact that there was any accumulation of gas in the chamber in which plaintiff was working when injured."

The Court: I will refuse to charge that, other than as I have. It is a question of fact. 943

Defendant excepts.

The Court (reading): "Second. That there is no evidence in the case upon which the jury can find as a fact that any accumulation of gas in the chamber exploded or was fired by plaintiff's lamp at the time he was injured."

The Court: The same way, I will leave it as a question of fact to the jury.

Defendant excepts.

The Court (reading): "Third. That there is no evidence in the case upon which the jury can find as a fact that an accumulation of gas in the chamber where plaintiff was working when injured was a proximate cause of his injuries." 944

As to all these matters the jury of course have got to find what was the proximate cause of the injury. What I have charged about is merely a statement of the rules as to which you shall consider what is the proximate cause. Now, having left that question to you, I refuse to charge as requested.

Defendant excepts.

The Court (reads): "Fourth. That there is no evidence in the case upon which the jury can find as a fact that any defect in the mine structure, machinery, engines or ventilating appliances, had anything to do with or any connection with the cause of plaintiff's injuries." 945

I refuse to so charge.

Defendant excepts.

The Court (reading): "Fifth. That there is no evidence in the case that plaintiff's injuries were caused or contributed to by any person for whose acts towards the plaintiff the defendant can be held liable as a matter of law."

946 I will refuse to charge and will give you an exception.

The Court (reading): "Sixth. That the evidence shows as a matter of fact and law that plaintiff was injured because of the explosion of the charge which he, himself, had planted or fixed in the prosecution of his work as a certified coal miner."

I do charge that. Whether or not he received any other injuries in the form of a small burn is substantially immaterial. The question as to whether the explosion of gas was the proximate cause of the injury I have left to the jury.

947 Mr. Thomsen: Defendant excepts to the modification.

The Court (reading): "Seventh. That so far as this case is affected, the defendant was under no legal obligation towards plaintiff to make his place of work reasonably safe so far as the work which plaintiff was doing tended to make his place of work dangerous."

I have charged that. In effect I so charge; that is, as to what the plaintiff himself was doing. As to whether gas might be exploded, I refuse to charge that.

Defendant excepts.

948 The Court (reading): "Eighth. That there is no evidence in the case upon which the jury can find as a fact or law that the defendant failed in its duty to plaintiff to give him a reasonably safe place in which to work."

I will refuse to charge except as I have.

Defendant excepts.

The Court (reading): "Ninth. That all the things used in the work and present in the chamber with plaintiff at the time of the accident were under plaintiff's own control and management."

In so far as the plaintiff was using them I will charge, yes.

The Court (reading): "Tenth. That all the evidence and the physical condition of plaintiff, as shown by the evidence, makes it necessary for the Court to hold as a matter of law, and for the jury to find as a matter of fact, that the ventilation of the mine was not a cause, proximate or otherwise, of plaintiff's injuries."

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I will refuse to charge that. In all of these, where I am leaving the question to the jury, I am leaving the evidence for you to consider, and merely the charge or refusal to charge, that there is something for you to consider, is only an instruction that there is a conflict on that point.

Defendant excepts to the refusal to charge as requested.

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The Court (reading): "Eleventh. That plaintiff was making his own place of work and therefore the defendant had no duty to perform as to the place of work so far as this case is concerned."

I refuse to charge other than as I have. I will charge that in so far as the plaintiff was doing work any danger that he should have looked out for himself is not something that the defendant is responsible for.

Defendant excepts to refusal to charge as requested.

The Court (reading): "Twelfth. That plaintiff was an experienced and expert miner, and assumed all the risks which he created himself by his work and by the way and manner in which he did his work."

951

Yes, I will charge that. The jury will understand that coal mining is a dangerous occupation and that the miner assumes the necessary and expected or reasonable risks that are connected therewith merely by the fact that he is mining coal; but he has a right also to have all the duties which his employer owes to him performed so that the

952 risks shall not be changed or increased more than are those that are properly connected with what he has to do.

Defendant excepts to the refusal to charge as requested.

The Court (reading): "Thirteenth. That the jury must find that the chamber in which plaintiff was injured was properly ventilated and was in proper condition as to ventilation and was reasonably safe, so far as ventilation may be considered in this case, when plaintiff was injured and just prior thereto."

953 I will leave that as a question of fact, and refuse to charge except as I have already charged.

Defendant excepts

The Court (reading): Fourteenth. That because of all the evidence in the case, the jury must find that plaintiff's injuries were caused by himself, alone, by his own negligence."

I will leave that to the jury.

Defendant excepts.

The Court (reading): "Fifteenth. That defendant is not liable for any failure of duty or any overt act of negligence upon the part of the mine-foreman."

So far as his acts were faults of inspection or statutory duty I so charge.

954

Plaintiff excepts.

The Court (reading): "Sixteenth. That the defendant's expert witnesses testified that the accident could not have occurred as a result of natural law under the circumstances and facts as testified to by the plaintiff. That the plaintiff was bound to produce some evidence in rebuttal to the defendant's evidence referred to. Plaintiff did not do so and therefore he failed to make out a cause of action in this case."

I will refuse to charge that, because, as I have

said, if the jury find that the accident occurred as the plaintiff says, then the expert testimony would not control. 955

Defendant excepts.

The Court (reading): "Seventeenth. That it is conceded by both parties to the case as a matter of fact and law that at the time of the accident the plaintiff and defendant were engaged in interstate commerce."

Whether it is conceded or not, I charge you that it does not enter into the case at present.

Defendant excepts.

The Court (reading): "Eighteenth. That the plaintiff did not begin this action within two years after the cause of action arose." 956

I have so charged, and have ruled on that, and I do so charge.

The Court (reading): "Nineteenth. That the evidence shows conclusively that the working place where plaintiff was injured had been provided with an adequate supply of pure air and ventilated by the ventilating apparatus, whatever the condition of said apparatus may have been, from the time plaintiff began work on July 6, 1911, until the moment when the plaintiff tested the place for gas, just prior to the accident."

I will leave it as a question of fact. The jury must take their recollection of the evidence. It is undisputed that the plaintiff began work that morning and that he continued to work and tested the place just prior to the accident. Now, whether or not the ventilation was reasonably safe up to that time may involve a question of fact. It is not disputed that up to that time no explosion had occurred. 957

Defendant excepts.

The Court (reading): "Twentieth. That neither the Pennsylvania Statutes or the Common Law, so

958 far as they may be considered as a measure of liability in this case, have anything to do with this case."

I refuse to charge except as I have.

Defendant excepts.

The Court: You may have an exception to all my refusals to charge, or the modifications.

Mr. O'Neill: I ask your Honor to charge the jury that with reference to defendant's alleged expert testimony they are not to take defendant's counsel's recollection or plaintiff's counsel's recollection as to what they testified to, but they are to take their own recollection and also to consider the effect of the cross examination upon those witnesses.

959

The Court: I charge them that with reference to every witness; not only experts, but lay witnesses; the jury will take their own recollection of the facts.

Mr. O'Neill: I ask your Honor to charge the jury that in considering the question of damages in this case, if they reach that question, that they must consider not only the plaintiff's lost wages in the past and the future, and the expenses to which he will be put in having himself taken care of, but also, entirely independent of those direct specific financial losses, the physical disability which he is in, his lost eye sight and his inability to use his limbs to the extent to which it has been proven.

960

The Court: Those are elements of physical disability. You are to figure compensation for the loss. Now, the loss is greater than the mere earning capacity; the compensation would be based on the loss, not simply upon the earning capacity. I have directed you to use the earning capacity and the situation of the plaintiff as a basis for figuring the absolute loss. It comes down to the same point. If a man doesn't suffer physical pain he has no claim for compensation for the mental pain

he is going to suffer. If he merely suffers mental worry or feeling badly because it happened, there must not be any compensation for that. But in so far as the actual loss of some member, like an eye, or the injury to the leg, makes a difference in activities in his life, in considering how much money difference it makes you are to estimate what money would represent the actual difference.

961

Mr. O'Neill: What I meant to say is this: The loss of his sight and the disability of his limbs is not to be considered merely by the jury in figuring out how it will cause any loss of wages or require him to go to any expense.

The Court: I have said that it is not to be considered solely from that standpoint; but that is a tangible situation from which they must judge what their estimate would be.

962

Mr. Thomsen: I move, upon the whole case and upon the charge of the Court, as modified and as it is down to date, to direct a verdict in the case for the defendant.

The Court: I think there is a question of fact, so that I must deny that motion as I did before.

Defendant excepts.

Mr. O'Neill: With reference to these batteries, if the defendant adopted an unsafe method in the mining of coal by directing this man to no longer use batteries because it was too expensive for the company, and that this unsafe method was directed by the defendant to be used by the plaintiff and that that was a contributing cause of his injury, I ask that it may be considered by the jury.

963

The Court: I will refuse to charge that as of itself any ground of negligence. The plaintiff used the powder or method of exploding the coal that he was using at the time, and I do not think that the mere fact that there was a change from dynamite to powder would of itself be any negligence; but

964 if, using powder, it affected the question of ventilation or the arrangement of the mine, then the fact that they were using powder instead of dynamite would be taken into account. If it requires any difference in protecting or arranging the mine because of the greater danger in using the squib instead of dynamite, that is a point of the situation for you to consider.

Defendant excepts.

Plaintiff excepts to the refusal to charge as requested.

965 Mr. Yankaus: If the defendant knew that it was a dangerous kind of employment, and he knew also that by using other means it would reduce the danger, and if they adopted more dangerous ways to perform such employment, then the defendant should be held liable.

966 The Court: I will not charge that. The only question is whether the place as they maintained it was dangerous. The question is whether there was reasonable expectation of danger, and whether that was taken care of so far as the defendant was concerned, and whether the plaintiff was free from carelessness himself; limiting, of course, the question of danger that the defendant had to do with to the matters that I have charged, and not to those that the mine foreman or some other statutory employee was responsible for.

The Marshal is sworn and the jury retire at 4:20 P. M.

The jury came in at 9:15 for instructions, and asked the following questions:

The Foreman: What, in this case, could be considered contributory negligence?

The Court: As a proposition of law, contributory

negligence would be any act on the part of the plaintiff which would be negligence; that is, something done without the use of reasonable care on his part, which was the cause of the accident. That is, which contributed to the accident in such a way that if he had been careful in respect to that matter the accident would not have happened.

967

Now, that is a legal proposition. As far as the application as to the facts is concerned, it would be contributory negligence if the plaintiff either was careless in not using the proper precaution in case he knew there was gas present, or in not using proper precautions in exploding his own blast. That is, it involves the question whether the explosion came from the gas or from the shot. If you find that the explosion came from the gas then it would be negligence if the plaintiff knew that gas was present, and was negligent or careless in having his open lamp where it could set off the gas, or, if the plaintiff knew that the gas had been escaping and he did not test it, or was not careful to avoid having the lamp around where the gas was.

968

You will remember the testimony that gas has no smell, and could not be discovered unless by the safety lamp; he testified he used the safety lamp in trying to locate gas before he started to set off the blast. As far as the gas was concerned, if he failed to test with the safety lamp that would be contributory negligence. If, up to that time, he had found any indication of gas and ignored it. But if, up to that time, he had not found any indication of gas and had been allowed to go into the mine to work upon the orders of the mine foreman, after it had been found that the mine was all right, and if he tested and discovered that there was no gas, before he started to set off his blast, then he would not be guilty of contributory negligence in that respect.

969

970 But even so, he could be guilty of contributory negligence if something else had occurred to indicate to him that gas was present.

You remember his testimony was that they told him that there had been some gas present, but that he could go to work.

971 The plaintiff said that it was reported to him that there had been gas, but that there was none present at the time of the examination, and the defendant's testimony was that he was allowed to go to work because there was no gas, and therefore, it would indicate that that was the fact; that there was nothing to show the presence of gas when he went to work. So that if anything occurred to indicate the presence of gas it must have been after he went to work, and he has told you that he found nothing, and that he tested before he set off his blast. He had been working for some time previously, without any explosion of gas, and if no explosion had occurred and if he tested with the safety lamp before he set off the blast, it would seem to appear that there was nothing to indicate the presence of gas so that it would be contributory negligence on his part so far as his testing for gas was concerned.

972 The only other question concerning contributory negligence would have been if he failed to use the canvas, if you find that it was so, so as to direct the current of air into the crosscut. If he had a piece of canvas and didn't use it, and if that was the cause of the accident, then it would be his fault. If he didn't have the canvas there, or if the brattice did not extend to the corner of the sixth crosscut, so as to ventilate the working place, then, unless there was some indication of gas, and if he tested for gas, it seems that there would be no negligence on his part in that respect.

On the other hand, if there was no gas, and

if the gas did not explode, then the question of contributory negligence would depend upon what he did with reference to lighting the squib. If he lighted the squib in such a way that he did not give himself time enough to get away then, of course, that would be his fault. 973

These practically are the questions of contributory negligence as to facts. In other words, if you believe the plaintiff's story that he went into the mine at a time when an inspection showed that there was no gas there, and if there had been no indication of the presence of gas, if he made the test with a safety lamp and then started to light the fuse, and then if his open lamp exploded some gas which he had been unable to discover with his safety lamp, there would seem to be no contributory negligence on his part. You would have to consider whether there was any evidence of negligence on the part of the mine owner with respect to some duty which they owed him and which caused the accident. 974

Mr. O'Neill: Upon this question of contributory negligence I will ask your Honor to say to the jury that the burden of proof upon that question is upon the defendant; and if, upon that question, the evidence does not bring the jury to the conclusion that the plaintiff was guilty of a negligent act of omission which contributed to the result, then the verdict upon that question must be in favor of the plaintiff. 975

The Court: Contributory negligence has to be shown by the defendant; but if they show facts which would indicate negligence on the plaintiff's part, the burden on him includes satisfying you that he was not injured by his own negligent act or omission.

This is so even though the contributory negligence of the plaintiff must be shown by the defendant before the plaintiff is called upon to meet it.

976 Mr. O'Neill: I reserve my exception. With reference to your recital of the facts I ask your Honor to say to the jury that they are at liberty to consider, if they so recollect it, that at least one of the experts for the defendant testified that there might be gas in the cross cut which would light, and which the plaintiff could not discover by the use of his safety lamp.

The Court: That is, he might test with his lamp and not discover a spirt of gas from some other place.

977 The Foreman: The assistant foreman, in getting into the mine at 3 o'clock in the morning, did he go in there as an officer of the company?

The Court: He went in there in both capacities. If he merely failed to properly carry out the test in the manner required of him by the statute, that would be his own failure to do the work required of him as a mine foreman, and for which he was responsible under the State law, rather than for which the company was responsible, he acting as its representative.

978 If, on the other hand, when he entered the mine he failed to correct any condition which had been existing and which the representative of the owner (that is, of the mine) had allowed to exist with respect to furnishing a safe place in which the miners should work, then that would not be his personal neglect.

Third Juror: Was there any obligation on the part of the plaintiff to notify the foreman of any change in condition between the time of the last inspection and the time of the accident, which would render the condition of the cross cut unsafe?

The Court: If there was any change which would indicate the presence of gas, or if any-

thing rendered it dangerous to continue the mining of coal, then the question would not be whether he should have notified the mine foreman, but whether he should have stopped. If, knowing of the presence of gas so that the conditions were unsafe, he went ahead and set off the blast, then the fault would be his. That would be something for him to consider. The question is not one of notification, but he should have then stopped.

979

The statute says that if the gas is discovered, or if a charge fails to explode, or if any fire is noticed, or any condition is observed from which explosion would be likely, then the miner should not work further, but should call the mine foreman and not go into the place until it had been inspected and reported safe. If he does not do this he takes the responsibility upon his own shoulders, and if accident results then he cannot recover.

980

The Foreman: As to the position of the brattice between the 5th and 6th cross cuts, what was the plaintiff's testimony as to that?

The Court read from its notes the testimony of the plaintiff that the brattice stopped 16 feet from the corner of the 6th cross cut; later testified that the brattice stopped about 10 or 12 feet from the corner.

981

Third Juror: What about the plaintiff's responsibility for going to work under those circumstances?

The Court: If he found any indication that the ventilating apparatus had stopped, or the brattice was not performing its work, then he would have to take that into account; but there is no testimony that the current of air was not being moved by the ventilating apparatus throughout the mine generally, or that the ventilating apparatus stopped. But if the mine had been inspected and

982 there was nothing to indicate to him that the ventilating apparatus was not working, so as to remove the gas, and if he made his test, and if some dangerous condition should result from the arrangement of the gangway or chamber, unless it was so apparent that he as a miner should not have undertaken to be mining coal under such conditions, then the question would be whether there was any negligence in the furnishing of a safe place for him to work in respect of something which the superintendent or the person in charge of the mine for the defendant had known about, or should have taken into account.

983 Juror No. 3 requests that the plaintiff's testimony be read.

The Court: If you wish to have it read I will send for the stenographer and it can be done; but I think that you had better go back and talk it over and see if it is necessary.

The Foreman: I do not think it is necessary. I remember the testimony.

The Court: The jury will retire, and let me know if they need to have the testimony read.

984 Mr. O'Neill: I will ask your Honor to call the attention of the jury, in connection with the position of the brattice, to this: If they do recollect this statement to be correct: That the plaintiff testified that that morning he spoke to Davis or Powell, and that they told him that they would have the brattice fixed or continued, and that this may be considered upon the question of the plaintiff's continuing to work.

The Court: The jury will take their recollection of the testimony. The defendant's counsel may have such exception to so much of what has been charged as he desires; that is, to everything that has been charged, if he wishes.

The jury retire at 9:45 P. M.

985

The stenographer having returned to the Court at 20 minutes of 12, the Court asked the jury if there was any testimony which they still wished to have read, and, in reply, the jury submitted a question, which required their attendance in Court, as follows:

"If the defendant company had a safe place for the plaintiff to work in during the day, and if the air current where the plaintiff worked was sufficient a very short space of time before the accident occurred, and if the conditions changed to a dangerous one a very short space of time before the accident happened, was the defendant company negligent?"

986

The Court: That involves a question of fact as to whether the place was a safe place, and whether, if the condition of danger changed it to an unsafe place that was a change that should have been reasonably expected from the arrangement of the place itself, or from the arrangement of the ventilating apparatus and the brattices, and whether the condition of danger was something that it would be negligence not to provide against. It is all a question of fact for the jury.

987

The testimony was that the charge was in the coal at a certain distance from the floor, which you will take from your recollection of the testimony, and that the plaintiff had succeeded in lighting the squib and was picking up his lamp from the floor to put it on his head, the test having showed that there was no gas in the chamber that the safety lamp would locate; and that, according to the plaintiff's testimony, the explosion occurred. Now, if that explosion resulted from the presence of gas which he couldn't detect by the

988 test of the safety lamp, and if that gas was present or collected and wasn't carried out of the chamber, because of either the position of the chamber or the arrangement of the place in the way that the defendant had provided it for the man to work in, if that condition of danger was reasonably to be anticipated, if a sudden accumulation of gas occurred so that the man could not find it by the test, then it would be negligence to allow the work to go on, and have the miner work in a place where a dangerous condition might reasonably occur or be expected to occur, and if nothing was done to render it safe against 989 what might be reasonably expected. It is a question of fact.

As I said before, there are two propositions: One is that there was an explosion of gas and that that was ignited by the use of a lamp, putting it on the miner's head after he had lighted the blast, in a way which would have been safe if the conditions were such as would be indicated by the test. That is, there would be no negligence on the part of the miner if he had tested the locality and had lighted the blast. It would be no negligence if he picked up the lamp and left the place.

990 Now, if the explosion resulted from the presence of gas at that time, then the question of fact would immediately come up as to whether that gas was present because of any defect in furnishing a safe place to work; and whether that defect was something that the officers of the company in charge of the gangway should have expected would occur or might occur, and should have provided against.

The other possibility, that is, the other statement of fact is that there was no gas there and that the explosion was entirely due to the firing of the shot through something else than any explosion of gas at all.

Mr. O'Neill: I ask your Honor to say to the jury that in considering whether or not there was an accumulation of gas which the plaintiff could not discover by testing with the safety lamp, and as to whether or not that accumulation of gas was the result of negligence, the jury are at liberty not only to consider the testimony with reference to the location of the brattice itself leading from the 5th to the 6th crosscut, but also such condition as they may find the planking in the 4th crosscut to be, as to whether they were loose or whether they were loosened by the blast, and whether they caused a sudden accumulation of gas. 991

The Court: The testimony was that any of the planking might be loosened by other blasts, and the question would be whether there was any condition of planking allowed to remain or any arrangement of the planking used which might create a condition of danger, so that it would be reasonably expected and should have been avoided. 992

Twelfth Juror: May I hear that part of the testimony of the plaintiff in which he described what actually occurred in the crosscut up to the time and during the time of the accident.

The Court: Do you mean the testimony in relation to the use of his lamp and the touch paper used in lighting the blast? 993

Twelfth Juror: Yes.

The stenographer read the testimony from the statement I was told not to use the dynamite any longer, but was told to use black powder, etc., down to "a squib will light anywhere."

The Court: The defendant may have an exception to all that I have charged in response to the questions asked by the jury, and also to the charge upon Mr. O'Neill's requests.

The jury again retire at 12:15 A. M.

994

Brooklyn, 4 April, 1914.

Met at 11 A. M., pursuant to adjournment at 4 A. M., as before.

The jury bring in a verdict for the plaintiff in the sum of \$50,000.

995

Mr. Thomsen: I move the Court to set aside the verdict and to grant a new trial on all the grounds specified in Section 999 of the Code of Civil Procedure of the State of New York; and on the further ground that the verdict is grossly excessive, when we take into consideration all the record of the case and all the papers filed in the case. I would like to have the Court reserve decision on that motion and hear argument on all phases of the case at some time when we can have had time to prepare for it.

The Court: I shall deny the motion on every ground except the question as to the amount of the verdict. There was a plain question of fact involved, and I should not change my ruling upon any of the questions of law. I will deny the motion in all respects except the question as to whether there should be any reduction of the amount, and will hear you on that question before an appeal is taken, if one is to be taken.

996

I will grant a stay of 60 days after the entry of judgment and extend the term until the first of June, and I will direct the Clerk to withhold the entry of judgment until Wednesday, so that if you want to take up the question of the amount you may come in some time before that. I am only reserving it in this sense, that if there is any discussion at all as to the amount the jury may understand that that rests with me, and not with any Court of Appeal; so that it seems to me proper to make sure that I am entirely satisfied on that question before the case is appealed; because afterwards

I would not have any right to exercise any opinion about it, and no other Court would have any jurisdiction.

997

Mr. Thomsen: There is just one thing that I would like to suggest to the Court, and that would be to present the interstate commerce phase. I think I could convince you that that is right.

The Court: No; I would rather have the question passed on than to consider it further.

Mr. Thomsen: I notice in the Lehigh Valley Coal Company's case, which I had the record of and looked up, that the Court and the attorneys extended the term from time to time for a longer period than I thought was possible. Now, in this case will the extension of the term to the first of June, in view of the length of the record, be sufficient?

998

The Court: That can be easily arranged afterwards. That simply means that between now and then there will be a decision as to whether there is to be an appeal.

Mr. Thomsen: I except to the rulings made by the Court this morning.

The Court: Yes. We reserved your exceptions last night to everything that I charged the jury.

Jury excused.

~~The Delaware, Lackawanna and Western Railroad Company, by its attorneys, said Judge has signed and sealed this bill of exceptions *nunc pro tunc* as of the 15th day of May, 1914, the term at which the said action was tried having been duly extended to August 1, 1914.~~

999

Witness the hand and seal of said Judge, this 27th day of July, 1914.

THOMAS I. CHATEFIELD,

[SEAL]

U. S. D. J.

Filed July 28, 1914.

1000

Stipulation as to Exhibits.

It is hereby stipulated that all other exhibits including Exhibits 1 and 2 not printed or which were used for any purpose upon the trial, may be used for the same purpose before the Courts of review.

Dated, New York, July 28, 1914.

BALTRUS S. YANKAUS,

Attorney for Plaintiff.

F. W. THOMSON,

W. S. JENNEY,

Attorneys for Defendant.

1001

EXHIBITS.**Exhibit 3.****AN ACT.**

Section 1. Be it enacted, &c., That in all actions brought to recover from an employer for injury suffered by his employe, the negligence of a fellow-servant of the employe shall not be a defense, where the injury was caused or contributed to by any of the following causes, namely:—

Any defect in the works, plant, or machinery, of which the employer could have had knowledge ~~by the exercise of ordinary care; the neglect of any~~ person engaged as superintendent, manager, foreman, or any other person in charge or control of the works, plant, or machinery; the negligence of any person in charge of or directing the particular work in which the employe was engaged at the time of the injury or death; the negligence of any person to whose orders the employe was bound to conform, and did conform, and, by reason of his having conformed thereto, the injury or death resulted; ~~the act of any fellow-servant, done in~~ obedience to the rules, instructions, or orders given by the employer, or any other person who has authority to direct the doing of said act.

1002

Section 2. The manager, superintendent, foreman, or other person in charge or control of the works, or any part of the works, shall, under this act, be held as the agent of the employer, in all suits for damages for death or injury suffered by employees.

1003

Section 3. All acts or parts of acts inconsistent herewith be and the same are hereby repealed.

Approved the 10th day of June, A. D. 1907.

Exhibit 4.**ARTICLE VIII.****Certified Mine Foremen.**

1004

Section 1. It shall not be lawful, neither shall it be permitted, for any person or persons to act as mine foreman or assistant mine foreman of any coal mine or colliery, unless they are registered as a holder of a certificate of qualification or service under this act.

Section 2. Certificates of qualification to mine foremen and assistant mine foremen shall be granted by the Secretary of Internal Affairs to every applicant who may be reported by the examiners, as hereinafter provided, as having passed a satisfactory examination and as having given satisfactory evidence of at least five years' practical experience as a miner, and of good conduct, capability and sobriety.

1005

The certificate shall be in manner and form as shall be prescribed by the Secretary of Internal Affairs, and a record of all certificates issued shall be kept in his department.

• • • • •

Section 4. Certificates of qualification to mine foremen and assistant mine foremen shall be granted by the Secretary of Internal Affairs to

1006 every applicant who may be reported by the examiners, as heretofore provided, as having passed a satisfactory examination and as having given satisfactory evidence of at least five (5) years' practical experience as a miner, and of good conduct, capability and sobriety. The certificate shall be in manner and form as shall be prescribed by the Secretary of Internal Affairs, and a record of all certificates issued shall be kept in the department. Certificates of qualification and certificates of service shall contain the full name, age and place of birth of the applicant, as also the length and nature of his previous service in or about the mines.

1007

Section 6. No mine shall be operated for a longer period than thirty days without the supervision of a mine foreman. In case any mine is worked a longer period than thirty (30) days without such certified mine foreman, the owner, operator or superintendent thereof shall be subject to a penalty of twenty dollars per day for each day over the said thirty (30) days during which the said mine is operated.

(Act of June 2, 1901.)

ARTICLE X.

1008

Section 1. The owner, operator or superintendent of every mine shall provide and maintain a constant and adequate supply of pure air for the same, as hereinafter provided.

Section 2. It shall not be lawful to use a furnace for the purpose of ventilating any mine wherein explosive gases are generated.

Section 8. All cross-cuts connecting the main inlet and outlet air passages of every district, when

it becomes necessary to close them permanently, shall be substantially closed with brick or other suitable building material, laid in mortar or cement whenever practicable, but in no case shall said air stoppings be constructed of plank except for temporary purposes. 1009

Section 15. The quantities of air in circulation shall be ascertained with an anemometer or other efficient instrument; such measurements shall be made by the inside foreman or his assistant once every week at the inlet and outlet airways, also at or near the face of each gangway and at the nearest crossheading to the face of the inside and outside chamber or breast where men are employed and the headings shall not be driven more than sixty (60) feet from the face of each chamber or breast and shall be entered in the colliery report book. 1010

ARTICLE XII.

General Rules.

Rule 1. The owner, operator or superintendent of a mine or colliery shall use every precaution to ensure the safety of the workmen in all cases, whether provided for in this act or not, and he shall place the underground workings thereof, and all that is related to the same, under the charge and daily supervision of a competent person who shall be called "mine foreman." 1011

Rule 2. Whenever a mine foreman cannot personally carry out the provisions of this act so far as they pertain to him, the owner, operator or superintendent shall authorize him to employ a sufficient number of competent persons to act as his assistants, who shall be subject to his orders.

- 1012 Rule 3. The mine foreman shall have charge of all matters pertaining to ventilation, and the speed of the ventilators shall be particularly under his charge and direction; and any superintendent who shall cause the mine foreman to disregard the provisions of this act shall be amenable in the same manner as the mine foreman.

* * * * *

- 1013 Rule 5. In mines generating explosive gases, the mine foreman or his assistant shall make a careful examination every morning of all working places and traveling roads and all other places which might endanger the safety of the workmen, before the workmen shall enter the mine, and such examination shall be made with a safety lamp within three (3) hours at most, before time for commencing work, and a workman shall not enter the mine or his working place until the said mine or part thereof and working place are reported to be safe. Every report shall be recorded without delay in a book which shall be kept at the colliery for the purpose and shall be signed by the person making the examination.

* * * * *

- 1014 Rule 8. If at any time it is found by the person for the time being in charge of the mine or any part thereof, that by reason of noxious gases prevailing in such mine or such part thereof, or of any cause whatever the mine or the said part is dangerous, every precaution shall be used to ensure the safety of the workmen; and every workman, except such persons as may be required to remove the danger, shall be withdrawn from the mine, or such part thereof as is so found dangerous, until the said mine or said part thereof is examined by a competent person and reported by him to be safe.

Rule 9. In every working approaching any place where there is likely to be an accumulation of explosive gases, or in any working in which danger is imminent from explosive gases, no light or fire other than a locked safety lamp shall be allowed or used. Whenever safety lamps are required in any mine they shall be the property of the owner of said mine, and a competent person, who shall be appointed for the purpose, shall examine every safety lamp immediately before it is taken into the workings for use, and ascertain it to be clean, safe and securely locked, and safety lamps shall not be used until they have been so examined and found safe, clean and securely locked. Unless permission be first given by the mine foreman to have the lamps used unlocked.

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Rule 12. The mine foreman or his assistant shall visit and examine every working place in the mine at least once every alternate day, while the men of such place are or should be at work, and shall direct that each and every working place is properly secured by props or timber, and that safety in all respects is assured by directing that all loose coal or rock shall be pulled down or secured, and that no person shall be permitted to work in an unsafe place unless it be for the purpose of making it secure.

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Rule 14. Any person having charge of a working place in any mine shall keep the roof and sides thereof properly secured by timber or otherwise so as to prevent such roof and sides from falling, and he shall not do any work or permit any work to be done under loose or dangerous material except for the purpose of securing the same.

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Rule 24. Any miner or other workman who shall discover anything wrong with the ventilating current or with the condition of the roof, side, timber or roadway, or with any other part of the mine in general, such as would lead him to suspect danger to himself or his fellow workmen or to the property of his employer, shall immediately report the same to the mine foreman or other person for the time being in charge of that portion of the mine.

* * * * *

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Rule 33. When a workman is about to fire a blast he shall be careful to notify all persons who may be in danger therefrom, and shall give sufficient alarm before and after igniting the match so that any other person or persons who may be approaching shall be warned of the danger.

Rule 34. Before commencing work and also after the firing of every blast, the miner working a breast or any other place in a mine, shall enter such breast or place to examine and ascertain its condition, and his laborer or assistant shall not go to the face of such breast or place until the miner has examined the same and found it to be safe.

1020

ARTICLE XVII.

* * * * *

Section 8. That for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any owner, operator, superintendent, mine foreman or fire boss of any coal mine or colliery, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby; and in case of loss of life by reason of such neglect or failure aforesaid, a right of ac-

tion shall accrue to the widow and lineal heirs of the person whose life shall be lost, for like recovery of damages for the injury they shall have sustained. 1021

ACT OF JUNE 15, 1897.

Section 1. Be it enacted, &c., That hereafter no person whosoever shall be employed or engaged in the anthracite coal region of this Commonwealth, as a miner in any anthracite coal mine, without having obtained a certificate of competency and qualification so to do from the "Miners' Examining Board" of the proper district, and having been duly registered as herein provided.

Section 2. That there shall be established in each of the eight inspection districts in the anthracite coal region, a board to be styled the "Miners' Examining Board" of the * * * district, to consist of nine miners who shall be appointed in the same manner as the boards to examine mine inspectors are now appointed from among the most skillful miners actually engaged in said business in their respective districts, and who must have had five years' practical experience in the same. The said persons so appointed shall each serve for a term of two years from the date on which their appointment takes effect, and they shall be appointed upon or before the expiration of the term of the present members of the "Miners' Examining Board," and they shall be and constitute the "Miners' Examining Board" for their respective districts, and shall hold the office for the term for which they were appointed, or until their successors are duly appointed and qualified, and shall receive as compensation for their services three dollars per day for each day actually engaged in this service, and all legitimate and necessary expenses incurred in attending the meetings of said board under the pro- 1022 1023

1024 visions of this act, and no part of the salary of said board or expenses thereof shall be paid out of the State Treasury.

Each of said boards shall organize by electing one of their members President, and one member as Secretary, and by dividing themselves into three sub-committees for the more convenient discharge of their duties, each of said committees shall have all powers hereinafter conferred upon the board; and whenever in this act the words "Examining Board" are used, they shall be taken to include any of the committees thereof.

1025 Every member of said board shall, within ten days of their appointment or being apprised of the same, take and subscribe an oath or affirmation before a properly qualified officer of the county in which they reside, that they will faithfully and impartially discharge the duties of their office.

Any vacancies occurring in said board shall be filled in the manner hereinbefore provided from among such only as are eligible for original appointment.

* * * * *

1026 Section 4. Each applicant for examination and registration and for the certificate hereinafter provided, shall pay a fee of one dollar to the said board, and a fee of twenty-five cents shall be charged for registering any person who shall have been examined and registered by any other said board, and the amount derived from this source shall be held by said boards and applied to the expenses and salaries herein provided and such as may arise under the provisions of this act; and the said boards shall report annually, to the Court of Common Pleas of their respective counties and the Bureau of Mines and Mining all moneys received and disbursed under the provisions of this act, together with the number of miners examined

and registered under this act and the number who failed to pass the required examination. 1027

Section 5. That it shall be the duty of each of the said boards to meet once every month and not oftener, and said meeting shall be public, and if necessary, the meeting shall be continued to cover whatever portion may be required of a period of three days in succession, and examine punder oath all persons who shall desire to be employed as miners in their respective districts; and said board shall grant such persons as may be qualified, certificates of competency or qualification which shall entitle the holders thereof to be employed as and to do the work of miners as may be expressed in said certificate, and such certificates shall be good and sufficient evidence of registration and competency under this act; and the holder thereof shall be entitled to be registered without an examination in any other of the anthracite districts upon the payment of the fee herein provided. 1028

All persons applying for a certificate of competency, or to entitle them to be employed as miners, must produce satisfactory evidence of having had not less than two years' practical experience as a miner, or as a mine laborer in the mines of this Commonwealth, and in no case shall an applicant be deemed competent unless he appear in person before the said board and answer intelligently and correctly at least twelve questions in the English language pertaining to the requirements of a practical miner, and be properly identified under oath, as a mine laborer by at least one practical miner holding miner's certificate. The said board shall keep an accurate record of the proceedings of all its meetings, and in said record shall show a correct detailed account of the examination of each applicant, with the questions asked and their answers, and at each of its meetings the board shall 1029

1030 keep said record open for public inspection. Any miner's certificate granted under the provisions of this act, and the hereinafter mentioned act approved the ninth day of May, Anno Domini one thousand eight hundred and eighty-nine, shall not be transferable to any person or persons whatsoever, and any transfer of the same shall be deemed a violation of this act. Certificates shall be issued only at meetings of said board, and said certificates shall not be legal unless then and there signed in person by at least three members of said board.

1031 Section 6. That no person shall hereafter engage as a miner in any anthracite coal mine without having obtained such certificate as aforesaid. And no person shall employ any person as a miner who does not hold such certificate as aforesaid, and no mine foreman or superintendent shall permit or suffer any person to be employed under him, or in the mines under his charge and supervision as a miner, who does not hold such certificate. Any person or persons who shall violate or fail to comply with the provisions of this act, shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine not less than one hundred dollars and not to exceed five hundred dollars, or shall undergo imprisonment for a term not less than thirty days and not to exceed six months, or either, or both, at the discretion of the court.

1032 * * * * *

Act of June 8, 1901.

Section 17. * * *

He shall also have the right, and it is hereby made his duty to make inquiry into the condition of such mine or colliery workings, machinery, ventilation, drainage, method of lighting or using lights, and into all matters and things connected with or relating to, as well as to make suggestions

providing for the health and safety of persons employed in or about the same, and especially to make inquiry whether the provisions of this act have been complied with.

1033

The foregoing bill of exceptions contains all the evidence given on the trial.

F. W. THOMSON,
W. S. JENNEY,
Attorneys for Defendant.

To

Baltrus S. Yankaus, Esq.,
Attorney for Plaintiff.

Stipulation.

1034

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

MATT YURKONIS,
Plaintiff,

against

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant.

1035

It is hereby stipulated that the bill of exceptions be settled, signed and allowed in the foregoing form and that the same be ordered on file.

Dated July 28, 1914.

BALTRUS S. YANKAUS,
Attorney for Plaintiff.
F. W. THOMSON,
W. S. JENNEY,
Attorneys for Defendant.

1036

The above and foregoing having been stipulated to be all of the proceedings, taken and had on the trial of said cause, and the above and foregoing having been stipulated to contain all the evidence offered or introduced by the parties to said cause or considered upon the trial thereof so far as material to the appeal,

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And as none of the matters and exceptions so offered and made to the rulings and directions of the Court appears upon the record of said cause, thereupon, upon the prayer of the said defendant, Delaware, Lackawanna & Western Railroad Company, by its attorneys, this bill of exceptions is hereby settled and ordered filed *nunc pro tunc* as of the 15th day of May, 1914, the term at which the said action was tried having been duly extended to September 15th, 1914.

Witness the hand of said Judge this 1st day of September, 1914.

THOMAS I. CHATFIELD,

U. S. D. J.

Filed September 3rd, 1914.

1038

Petition for Writ of Error.

1080

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

MATT YURKONIS,
Plaintiff,

against

DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Defendant.

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And now comes the Delaware, Lackawanna and Western Railroad Company, the defendant herein, and says: That on or about the thirteenth day of May, 1914, this Court entered judgment herein in favor of the plaintiff and against the defendant, for the sum of thirty-six thousand ninety-nine dollars and eighty cents (\$36,099.80), in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will appear in more detail in the assignment of errors which is filed with this petition.

Wherefore, the defendant prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of, and that a transcript of the record proceedings

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1042 and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

Dated, New York, June 5, 1914.

F. W. THOMSON,

W. S. JENNEY,

Attorneys for Delaware, Lackawanna

and Western Railroad Company,

Office and P. O. Address,

No. 90 West Street,

Borough of Manhattan,

New York City, N. Y.

Filed June 12th, 1914.

1043

Assignment of Errors.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

MATT YURKONIS,

Plaintiff,

against

DELAWARE, LACKAWANNA &

WESTERN RAILROAD COMPANY,

Defendant.

1044

Now comes the defendant, The Delaware, Lackawanna and Western Railroad Company, by F. W. Thomson and W. S. Jenney, its attorneys, and says, that in the above entitled cause, there are manifest errors which occurred upon the trial of said cause, and upon which it will rely in its prosecution of the writ of error in the above entitled cause in this and to all of which exceptions were had, to wit:

First. At the conclusion of the testimony offered by and in behalf of the plaintiff herein, the Trial Court erred in denying defendant's motion that the plaintiff's complaint be dismissed and that the Court direct a verdict for the defendant on the following grounds, viz.:

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"1. That the plaintiff has failed to show any negligence for which the defendant is liable as a matter of law.

2. That the evidence shows conclusively that the plaintiff's injuries were caused wholly by his own negligence.

3. That the plaintiff must be held as a matter of fact and of law, under the evidence, to have assumed the risks of being injured in the way and manner in which he was injured.

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4. That the sole proximate cause of the plaintiff's injuries was his own negligent acts in doing his work.

5. That the evidence shows conclusively that the mine structure, ways, works and facilities, whatever their condition may have been at the time of the accident, are not relevant or material to this case.

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6. That the evidence shows conclusively that there was no explosion of accumulated gas in the chamber or working place where the plaintiff was working at the time of the accident.

7. That the evidence shows conclusively that plaintiff's injuries were not caused by anything directly or indirectly related to the ventilation of the mine.

8. That the defendant owed no duty to

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the plaintiff to furnish plaintiff with anything except a properly ventilated place to work in.

9. That the evidence shows conclusively that the defendant violated no legal duty towards the plaintiff.

10. That the evidence shows conclusively that plaintiff's injuries were caused by an explosion of powder which he shot off himself, and that plaintiff was an expert miner of long experience in handling explosives and in firing them off."

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Second. At the conclusion of the testimony offered by and in behalf of both plaintiff and defendant herein, the Trial Court erred in denying defendant's motion that the plaintiff's complaint be dismissed and that the Court direct a verdict for the defendant upon all the grounds specified in defendant's motion for the same purpose, which motion was made at the close of the plaintiff's evidence and which grounds are set forth in the previous assignment of error and marked "First" herein, and upon the further ground, viz.: That the evidence now shows that the plaintiff commenced an action against the defendant on the 7th day of May, 1913, basing the defendant's liability in his complaint upon the common law and the statute law of the State of Pennsylvania; and that thereafter, and on October 17th, 1913, the plaintiff served an amended complaint and changed the measure of defendant's liability from said laws to the Federal Employers' Liability Act; and that the amended complaint was served and filed more than two years after the plaintiff received his injury; and that it now appears in the case that at the time the plaintiff was injured the Federal Act did apply to him and he having failed to seek his remedy un-

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der the Federal Act as prescribed by it, viz., within two years after his cause of action arose, the plaintiff cannot recover. 1051

Third. The plaintiff having pleaded the defendant's liability because of the Federal Employers' Act and upon the trial of that cause of action while the plaintiff was engaged in proving facts to show that said Federal Act was applicable to his cause of action, the defendant having conceded said facts and said concession having been accepted by the plaintiff, the Trial Court erred in refusing to hold that the defendant's liability must be measured by this said Federal Act and in refusing to hold that said Federal Act was exclusive of all common law and Pennsylvania Statute law. 1052

Fourth. That the Trial Court erred in submitting the case to the jury under the common law of the State of Pennsylvania.

Fifth. That the Trial Court erred in submitting the case to the jury under the statutory law of the State of Pennsylvania.

Sixth. That the Trial Court erred in refusing to hold that the Federal Employers' Liability Act was the only law applicable to the case.

Seventh. That the Trial Court erred in refusing to dismiss the complaint and to direct a verdict for the defendant upon the ground that the Federal Employers' Liability Act was the only law under which plaintiff might recover and that plaintiff was barred from any recovery under said act because he had failed to begin his action within the period of time prescribed in said statute. 1053

Eighth. Immediately upon the rendering of the verdict by the jury, the defendant moved the Court upon the Court's minutes to set aside the verdict

1054 and to grant a new trial upon all the grounds specified in Section 999 of the Code of Civil Procedure of the State of New York, which said grounds were as follows, viz.:

1. Upon defendant's exceptions.

2. Because the verdict was for excessive damages.

3. Because the verdict was contrary to the evidence, and

4. Because the verdict was contrary to law, and the Trial Court erred in denying said motion.

1055 Ninth. That after the Court had considered defendant's requests to charge and also defendant's exceptions to the charge to the jury, defendant, upon the whole case and upon the charge of the Court as modified by the Court pursuant to said requests or otherwise, moved the Court to direct a verdict for the defendant and the Trial Court erred in denying said motion.

1056 Tenth. The plaintiff having brought his action under the Federal Employers' Liability Act by virtue of his amended complaint and the defendant having pleaded in answer thereto the two years' limitation contained in said statute; and the defendant having upon the trial in open court conceded and stipulated that both as a matter of fact and law, plaintiff and defendant were engaged in interstate commerce when plaintiff received his injury; and the plaintiff having accepted said concession and entered into said stipulation, the Court erred in submitting the case to the jury under other laws and in holding that the Federal Employers' Liability Act was not exclusive in its operation, and in holding that said act was merely cumulative.

Eleventh. The Court erred in its charge to the jury whereby it permitted the jury to find that plaintiff's injuries were caused by an explosion of gas. 1057

Twelfth. The Court erred in its charge to the jury whereby it permitted the jury to find that the defendant or any of its employees for whose negligence it might have been liable, was negligent in respect to the inspection of the ventilating facilities, or in respect to the condition of such facilities on the day of the accident.

Thirteenth. The Court erred in refusing defendant's request to charge as follows: "That there is no evidence in the case upon which the jury can find as a fact that there was any accumulation of gas in the chamber in which plaintiff was working when injured." 1058

Fourteenth. The Court erred in refusing defendant's request to charge as follows: "That there is no evidence in the case upon which the jury can find as a fact that any accumulation of gas in the chamber exploded or was fired by plaintiff's lamp at the time he was injured."

Fifteenth. The Court erred in refusing defendant's request to charge as follows: "That there is no evidence in the case upon which the jury can find as a fact that an accumulation of gas in the chamber where plaintiff was working when injured was a proximate cause of his injuries." 1059

Sixteenth. The Court erred in refusing defendant's request to charge as follows: "That there is no evidence in the case on which the jury can find as a fact that any defect in the mine structure, machinery, engines or ventilating appliances, had anything to do with or any connection with the cause of plaintiff's injuries."

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Seventeenth. The Court erred in refusing defendant's request to charge as follows: "That there is no evidence in the case that plaintiff's injuries were caused or contributed to by any person for whose acts towards the plaintiff, the defendant can be held liable as a matter of law."

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Eighteenth. The Court erred in refusing defendant's request to charge as follows: "That all the evidence and the physical condition of plaintiff, as shown by the evidence, makes it necessary for the Court to hold as a matter of law, and for the jury to find as a matter of fact, that the ventilation of the mine was not a cause, proximate or otherwise, of plaintiff's injuries."

Nineteenth. The Court erred in refusing defendant's request to charge as follows: "That the jury must find that the chamber in which plaintiff was injured was properly ventilated and was in proper condition as to ventilation and was reasonably safe, so far as ventilation may be considered in this case, when plaintiff was injured and just prior thereto."

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Twentieth. The Court erred in refusing defendant's request to charge as follows: "That because of all the evidence in the case the jury must find that plaintiff's injuries were caused by himself, alone, by his own negligence."

Twenty-first. The Court erred in refusing defendant's request to charge as follows: "That the defendant's expert witnesses testified that the accident could not have occurred as a result of natural law under the circumstances and facts as testified to by the plaintiff. That the plaintiff was bound to produce some evidence in rebuttal to the defendant's evidence referred to. Plaintiff did not do so and therefore he failed to make out a cause of action in this case."

Twenty-second. The Court erred in refusing defendant's request to charge the jury as follows: "That it is conceded by both parties to the case as a matter of fact and law that at the time of the accident the plaintiff and defendant were engaged in interstate commerce."

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Twenty-third. The Court erred in charging the jury as follows: "Whether it is conceded or not, I charge you that it does not enter into the case at present."

The word "it" above meaning the questions as to the Federal Liability Act.

Twenty-fourth. The Court erred in refusing defendant's request to charge the jury as follows: "That the evidence shows conclusively that the working place where plaintiff was injured had been provided with an adequate supply of pure air and ventilated by the ventilating apparatus, whatever the condition of said apparatus may have been, from the time plaintiff began work on July 6th, 1911, until the moment when the plaintiff tested the place for gas, just prior to the accident."

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Twenty-fifth. The Court erred in refusing defendant's request to charge as follows: "That neither the Pennsylvania statutes or the common law so far as they may be considered as a measure of liability in this case, have anything to do with this case."

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And the said Delaware, Lackawanna and Western Railroad Company prays that the judgment aforesaid may be reversed and the plaintiff's complaint be dismissed, and judgment for defendant be ordered on the merits, and that it may be restored

- 1066 to all things which it has lost by reason of the said judgment.

F. W. THOMSON,
W. S. JENNEY,
Attorneys for Defendant,
Office & Post Office Address,
No. 90 West Street,
Borough of Manhattan,
New York City.

Filed June 12, 1914.

Citation.

- 1067 By the Honorable Thomas I. Chatfield, one of the Judges of the District Court of the United States for the Eastern District of New York, in the Second Circuit, to Matt Yurkonis, Greeting:

- 1068 You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit to be holden at the Borough of Manhattan, in the City of New York, in the circuit above named, on the sixth day of July, 1914, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Eastern District of New York, wherein the Delaware, Lackawanna and Western Railroad Company is plaintiff-in-error and you are defendant-in-error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Brooklyn, in the City of New York, in the District and Circuit above named, this eleventh day of June in the year of our Lord one thousand nine hun-

dred and fourteen, and of the Independence of the
United States the one hundred and thirty-eighth.

1069

THOMAS I. CHATFIELD,

Judge of the District Court

of the United States

for the Eastern District of New York,

in the Second Circuit.

Received and filed June 12, 1914.

Due service of a copy of the within citation is
hereby admitted.

Dated, New York City, N. Y., June 12th, 1914.

BALTRUS S. YANKAUS,

Plaintiff's Attorney.

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Bond.

**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.**

MATT YURKONIS,
Plaintiff,
against

**DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,**
Defendant.

1073

Know all men by these presents, that we, Delaware, Lackawanna and Western Railroad Company, having an office and principal place of business at 90 West Street, Manhattan, New York City, as Principal, and the American Surety Company of New York, having an office and principal place of business at 100 Broadway, New York City, N. Y., as surety, are held and firmly bound unto the above named Matt Yurkonis, his successors administrators and assigns, in the sum of fifty thousand dollars (\$50,000) lawful money of the United States of America; to be paid to the said Matt Yurkonis, his successors, administrators or assigns; for the payment of which, well and truly to be made, we jointly and severally bind ourselves, and our respective successors and assigns, firmly by these presents.

1074

Sealed with our seals and dated the eighth day of June, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, the Delaware, Lackawanna and Western Railroad Company has sued out a writ of error to the United States Circuit Court of Ap-

peals for the Second Judicial Circuit, to reverse the judgment rendered in the above entitled suit, by the District Court of the United States for the Eastern District of New York, on or about the thirteenth day of May, 1914, and for the sum of thirty-six thousand and ninety-nine dollars and eighty cents (\$36,099.80),

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Now, therefore, the condition of this obligation is such, that if the above named Delaware, Lackawanna and Western Railroad Company shall prosecute said writ of error to effect and answer all costs and damages that may be awarded against it if it shall fail to make its plea good, then this obligation to be void, otherwise to remain in full force and virtue.

1076

DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,

By W. H. Truesdale,
President.

Attest:

W. D. Chambers,
[SEAL.] Secretary.

AMERICAN SURETY COMPANY
OF NEW YORK,

By Marshall L. Brower,
Resident Vice-President.

(L. S.)

Attest:

George R. Crosby,
Resident Assistant Secretary.

1077

State of New York, }
City and County of New York, } ss.:

On this 11th day of June, in the year 1914, before me personally came W. H. Truesdale, to me known, who, being by me duly sworn, did depose and say that he resides in Greenwich in the State of Connecticut; that he is the President of the Delaware, Lackawanna and Western Railroad

- 1078 Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

JOSEPH FIELL,

Notary Public, 1077,

[SEAL.]

New York County.

Commission expires March 30th, 1915.

- 1079 State of New York, }
County of New York, } ss.:

- On this 8th day of June, 1914, before me personally appeared Marshall L. Brower, Resident Vice-President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in The City of New York, N. Y.; that he is the Resident Vice-President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Marshall L. Brower further said that he is acquainted with George R. Crosby and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said George R. Crosby subscribed to the said instrument is in the genuine handwriting of the said George R. Crosby and was thereto subscribed by the like order of the said Board of Trustees, and in the presence
- 1080

of him the said Marshall L. Brower, Resident Vice-President.

1081

E. A. FARRELL,

Notary Public,

New York County, No. 1058.

Register's Office, New York County, No. 5015.

Certificate filed in all counties.

State of New York, {
County of New York, { ss.:

George R. Crosby, being duly sworn, says: That he is a Resident Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to Section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than \$5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

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1083

GEORGE R. CROSBY.

Subscribed and sworn before me)

this 8th day of June, 1914.)

E. A. Farrell,

Notary Public,

New York County, No. 1058.

Register's Office, New York County, No. 5015.

Certificate filed in all counties.

1084 **Extract from the Record Book of the Board
of Trustees of the American Surety
Company of New York.**

The first meeting of the Board of Trustees of the AMERICAN SURETY COMPANY OF NEW YORK, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 20, 1914, at eleven o'clock A. M.

"The Secretary read the report of the Nominating Committee as follows:

1085 **"To the Board of Trustees of the
AMERICAN SURETY COMPANY OF NEW
YORK:**

"Gentlemen:

"The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 9, 1913, for the purpose of nominating*** officers of the Company,*** for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for

Place.	Resident Vice-Presidents.
New York, N. Y.	Marshall L. Brower
	A. E. Cotterell
	William M. Tomlins, Jr.
	Lester S. Moore
	Joseph A. Sinn
	William H. Bishop

1086

Resident Assistant Secretaries.

1087

Marshall L. Brower
William H. Bishop
A. E. Cotterell
Chas. S. Waterbury
Daniel Stewart
E. D. Sadler
George R. Crosby
W. H. E. Reinecke
Joseph A. Sinn
E. J. Sabater
Louis Paper

"WHEREUPON, it was

"RESOLVED, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the Members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

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"The following resolution was adopted:

"RESOLVED, that the Resident Vice Presidents be and they hereby are, and each of them is hereby authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

1089

State of New York,)
County of New York,) ss.:

I, W. H. Riley, Assistant Secretary of the Ameri-

- 1090 can Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions;
- 1091 and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 26th day of January, 1914.

(Signed) W. H. RILEY,
(L. S.) Assistant Secretary.

The within bond is hereby approved as to form and sufficiency of sureties and is hereby accepted and allowed.

Dated, Brooklyn, N. Y., June 11th, 1914.

THOMAS I. CHATFIELD,
U. S. D. J.

1092

Filed June Twelfth, 1914.

Due service of a copy of the within supersedeas bond is hereby admitted the 12th day of June, 1914, New York City, N. Y.

BALTRUS S. YANKAUS,
Plaintiff's Attorney.

Clerk's Certificate.

1003

United States of America, }
 Eastern District of New York, } ss.:

I, Percy G. B. Gilkes, Clerk of the District Court of the United States of America for the Eastern District of New York, do hereby certify that the foregoing is a true transcript of the summons, complaint, petition on removal from the Supreme Court of the State of New York, Richmond County, to the United States District Court for the Eastern District of New York, answer, order substituting Baltrus S. Yankaus, Esq., as attorney for plaintiff in place of Charles Goldzier, amended complaint, answer to amended complaint, extract from the Clerk's minutes, order denying motion to set aside verdict upon condition that the plaintiff consent to the reduction of said verdict to \$36,000, stipulation consenting to said reduction, judgment, bill of exceptions, exhibits, stipulation, petition for writ of error, assignment of errors, supersedeas bond and citation, made up to be transmitted to the United States Circuit Court of Appeals for the Second Circuit, as the return to the writ of error sued out by the defendant in the suit wherein Matt Yurkonis is plaintiff, and The Delaware, Lackawanna & Western Railroad Company is defendant.

1004

In witness whereof, I have hereunto set my hand and seal of this Court the 3rd day of September, in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the United States the one hundred and thirty-ninth.

1005

PERCY G. B. GILKES,
 Clerk.

By J. G. COCHRAN,
 Deputy Clerk.

[SEAL.]

1096

Stipulation.

1097

It is hereby stipulated that the foregoing is a true transcript of the summons, complaint, petition on removal, answer, order of substitution, amended complaint, answer to amended complaint, extract from the Clerk's minutes, order denying motion to set aside verdict upon condition that the plaintiff consent to the reduction of said verdict to \$36,000.00, stipulation consenting to said reduction, judgment, bill of exceptions, exhibits, stipulation, petition for writ of error, assignment of errors, supersedeas bond, and citation, made up to be transmitted to the United States Circuit Court of Appeals for the Second Circuit as the return to the writ of error sued out by defendant in the suit wherein Matt Yurkonis is plaintiff, and The Delaware, Lackawanna and Western Railroad Company is defendant, and the Clerk of the United States District Court for the Eastern District of New York may certify the same as such.

Dated, New York City, July 28, 1914.

BALTRUS S. YANKAUS,
Attorney for Plaintiff.

F. W. THOMSON,
W. S. JENNEY,
Attorneys for Defendant.

1098

United States Circuit Court of Appeals for the Second Circuit.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Plaintiff in Error (Defendant Below),

against

MATT YURKONIS, Defendant in Error (Plaintiff Below).

Before Lacombe, Ward, and Rogers, Circuit Judges.

WARD, *Circuit Judge*:

This is a writ of error to review a judgment entered on the verdict of a jury in favor of the plaintiff for \$50,000 for personal injuries sustained by him while in the employment of the defendant, which verdict under an order of Judge Chatfield the plaintiff consented to reduce to \$36,000.

July 6, 1911, the plaintiff, who was a certified miner, employed for eighteen years in the Pettibone anthracite coal mine owned by the defendant, was terribly injured by the explosion of a blast which he had prepared.

May 7, 1913, this action was brought in the Supreme Court of New York for Richmond County and removed by the defendant to the United States District Court for the Eastern District of New York. The complaint proceeded upon the theory that the blast was prematurely exploded before the plaintiff could get away by an explosion of gas due to the defective ventilation of the place where he was working, in violation of the Pennsylvania Mining Law of June 2, 1891.

The amended complaint set forth Sections 1, 4, 8 and 9 of Article X and Rules 1 and 9 of Article XII; also Section 8 of Article XVII which are as follows:

"Article X. * * *

SECTION 1. The owner, operator or superintendent of every mine shall provide and maintain a constant and adequate supply of pure air for same, as hereinbefore provided.

* * * * *

SECTION 4. The ventilating currents shall be conducted and circulated to and along the face of each and every working place throughout the entire mine, in sufficient quantities to dilute, render harmless and sweep away smoke and noxious or dangerous gases, to such an extent that all working places and traveling roads shall be in a safe and fit state to work and travel therein.

* * * * *

SECTION 8. All cross-cuts connecting the main inlet and outlet air-passages of every district, when it becomes necessary to close them permanently, shall be substantially closed with brick or other suitable building material, laid in mortar or cement whenever practicable, but in no case shall said air-stoppings be constructed of planks except for temporary purposes.

SECTION 9. All doors used in assisting or in any way affecting

the ventilation shall be so hung and adjusted that they will 'close automatically."

"Article XII.

Rule 1. The owner, operator or superintendent of a mine or colliery shall use every precaution to insure the safety of the workmen in all cases, whether provided for in this act or not.

* * * * *

Rule 9. In every working approaching any place where there is likely to be an accumulation of explosive gases, or in any working in which danger is imminent from explosive gases, no light or fire or other than a locked safety lamp, shall be employed and used."

"Article XVII: * * *

SECTION 8. That for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any owner, operator, superintendent, mine foreman or fire boss of any coal mine or colliery, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby."

also the Pennsylvania Employers' Liability Act of June 10, 1907, which is as follows:

"SECTION 1. Be it enacted, etc., That in all actions brought to recover from an employer for injury suffered by his employe, the negligence of a fellow servant of the employe shall not be a defense, where the injury was caused, or contributed to by any of the following causes, namely: Any defect in the works, plant or machinery, of which the employer could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman or any other person in charge or control of the works, plant or machinery; the negligence of any person in charge of or directing the particular work in which the employe was engaged at the time of the injury or death; and negligence of any person to whose orders the employe was bound to conform, and did conform, and by reason of his having conformed thereto, the injury or death resulted; the act of any fellow servant, done in obedience to the rules, instructions, or orders given by the employer, or any other person who has authority to direct the doing of said act.

SECTION 2. The manager, superintendent, or foreman or other person in charge or control of the works, or any part of the works, shall under this act be held as the agent of the employer, in all suits for damages for death or injury suffered by employees.

SECTION 3. All acts or parts of acts inconsistent herewith be and the same are hereby repealed."

The mine consisted of a series of coal levels separated by strata of rock and extended 1047 feet below the surface of the ground, the level where the plaintiff was working being 500 feet below the surface. All these levels were ventilated with a ventilating fan which sucked the air out of the mine and so caused a vacuum into which fresh air rushed.

The plaintiff was working in a chamber about 400 feet in length running east and west and around it a continuous gangway was

gradually constructed as the work progressed, to be used by the miners as a working place. In the middle of the west end two doors were placed opposite to each other, with a space between, so that one would always be shut when the other was open, making an air lock. The air entered this chamber at a point south of these doors and then went by the south side to the east end, thence north to the north side and thence back into the main gangway. A miner named Fine and his helper had the mining on the south side of the chamber and the plaintiff and his helper had the mining on the north side. They made a series of north and south cross-cuts into the coal sixty feet apart, as required by law, working toward each other from the opposite sides. When they met at the center a solid cement and brick or masonry wall was erected, also as required by law. There were six cross-cuts in the chamber, beginning at the west end; the first three had been filled at the center, but the fourth was only closed by a loose board partition. The plaintiff was working at the sixth cross-cut, which was the limit of the property, was some seventy-five feet from the fifth and had not been cut through. The fifth cross-cut was properly left open, so that the air coming along the south side to the east end could be turned back and passed through the fifth cross-cut and thence to the sixth cross-cut. This diverting of the air was accomplished by a tight board partition called a brattice, between the floor and the roof at the south side and a similar brattice at the north side.

The negligence charged was that the fourth cross-cut was insufficiently closed; that the distance between the fifth and the sixth cross-cut was too long; that the plaintiff was allowed to go into the chamber with an open lamp and that the brattice which was intended to direct the air into his working place was not long enough and was not extended by canvas, as the practice was. It was alleged that in this way most of the air circled around the brattice into the gangway on the north side of the floor without going as far as his working place, the effect of which was that gas accumulated at the top of the cross-cut and was exploded by the open miner's lamp in his hat, knocking him down twice and exploding the blast before the fuse which he had lighted reached the powder and before he could get away to a place of safety.

October 2, 1913, more than two years after the cause of action arose, the plaintiff was permitted to file an amended complaint which included additional allegations to the effect that both he and the defendant were engaged in interstate commerce at the time the cause of action arose, which allegations the amended answer denied and also set up as a defense that the cause of action was barred under the Federal statute. At the trial, however, before any proof was made on this point, the defendant conceded that the parties were engaged in interstate commerce. This decided that issue in favor of the plaintiff's allegation. Accordingly, at the close of the case the defendant asked the court to direct a verdict for it on the ground that the Federal statute was exclusive of all other remedies that the cause of action was first pleaded when the amended complaint was served, more than two years after it arose, and when it

was barred. *Union Pacific R. R. Co. v. Weyler*, 158 U. S. 285. Thereupon the plaintiff moved to strike the allegations as to interstate commerce out of the amended complaint. The court denied this motion on the ground that it was unnecessary because the plaintiff could recover either under the law of master and servant at common law or under the Pennsylvania Employers' Liability Act, as the evidence permitted, the Federal act by virtue of the limitation of two years, having ceased to apply. We think this was a right conclusion for a wrong reason. The plaintiff had a right to recover otherwise if he could, not because the Federal act had ceased to apply, but because it never did apply. When it does apply it is the supreme law of the land and supersedes all other remedies. *Second Employers' Liability Cases*, 223 U. S. 1; *Wabash R. R. v. Hayes*, 234 U. S. 86, 89. We think it is quite clear that the mere act of mining coal is not interstate commerce and no concession by the defendant can give the court jurisdiction on that ground. However, if it could, the plaintiff's motion to strike the allegations out should have been granted. Even a stipulation entered into inadvertently in the course of a trial will be relieved against if the opposite party is not prejudiced. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 414; *Barry v. Mutual Life Insurance Co.*, 53 N. Y. 536. The amended complaint was evidently intended to enable the plaintiff to recover either under the Federal act or under the Employers' Liability Law of Pennsylvania or under the law of master and servant at common law, supplemented as to negligence by the Pennsylvania Mining Law, according as the evidence might permit. This was quite proper, *Wabash R. R. Co. v. Hayes*, 234 U. S. 86, and is the practice in the courts of the State of New York. *Paine v. New York, Susquehanna & Western R. R. Co.*, 201 N. Y. 436. The trial judge was therefore right in submitting the case to the jury if a cause of action was developed under either.

The plaintiff was the only witness as to the circumstances immediately preceding the accident and he testified that he was allowed to go into the chamber with an open lamp; that having examined for gas with his safety lamp he discovered none; that he thereupon lighted the squib placed to fire the blast, picked up his hat in which was an open mining lamp and started to walk out. As he raised his head he was knocked down by an explosion of gas, got up and was knocked down again and before he could get away the blast was exploded by the gas. He also testified that he had informed the mining foreman on the morning of the day of the accident that the brattice was not long enough to properly ventilate his working place and that the foreman promised to have it corrected which he did not do. The defendant sought to prove that this account of the explosion was impossible and that the blast must have gone off through the plaintiff's own negligence. These were questions which we think were properly submitted to the jury. The plaintiff's account does not appear to us so incredible or the cause of the explosion so disconnected with failure to furnish the ventilation required by the Pennsylvania Mining Law as to justify the direction of a verdict for the defendant. The judgment is affirmed.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Delaware, Lackawanna & Western Railroad Company against Matt Yurkonis. (Copy.) Opinion. Ward, Circuit Judge.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 22nd day of January, one thousand nine hundred and fifteen.

Present:

Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Plaintiff in Error,

vs.

MATT YURKONIS, Defendant in Error.

Error to the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

E. H. L.

H. G. W.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Endorsed: United States Circuit Court of Appeals, Second Circuit. D., L. & W. R. R. vs. Matt Yurkonis. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 26, 1915. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Judicial District.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Plaintiff in Error,
against

MATT YURKONIS, Defendant in Error.

Petition for Writ of Error.

And now comes The Delaware, Lackawanna and Western Railroad Company, the plaintiff in error herein, and says:

That on or about the thirteenth day or May, 1914, the United States District Court for the Eastern District of New York entered judgment herein in favor of the defendant in error and against the plaintiff in error, for the sum of thirty-six thousand ninety-nine dollars and eighty cents (\$36,099.80), which said judgment and the proceedings of said District Court in relation thereto, all having been reviewed by the United States Circuit Court of Appeals for the Second Judicial District upon a Writ of Error, have been by said Circuit Court of Appeals, unanimously affirmed with costs by its decree made on January 22, 1915, and entered in the office of the Clerk of said Court on January 26, 1915, and a mandate having been issued to said District Court in accordance with said decree, an order of said Eastern District Court was entered in the office of its Clerk on the 29th day of January, 1915, decreeing that the said judgment of the United States Circuit Court of Appeals in the Second Circuit be made the order and judgment of the said District Court and that the defendant in error have judgment against the plaintiff in error for the sum of Twenty-five Dollars (\$25.00) costs as taxed in the United States Circuit Court of Appeals, together with the sum of Seventy Cents (\$0.70), the Clerk's fees on filing said mandate and filing and entering said order, amounting in all to the sum of Twenty-five Dollars and Seventy Cents (\$25.70), in which judgment and proceedings of the said Circuit Court of Appeals certain errors were committed to the prejudice of this plaintiff in error, all of which will appear in more detail in the assignment of errors which is filed with this petition.

Wherefore, the plaintiff in error prays that a writ of error may issue in this behalf to the United States Supreme Court for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Supreme Court.

Dated, New York City, February 1, 1915.

F. W. THOMSON,
W. S. JENNEY,

*Attorneys for The Delaware, Lackawanna and
Western Railroad Company.*

Office and Post-Office Address, No. 90 West Street, Borough of Manhattan, New York City.

Filed February 6th, 1915.

E. HENRY LACOMBE, U. S. C. J.

(Endorsed:) United States Circuit Court of Appeals for the Second Judicial Circuit. The Delaware, Lackawanna and Western Railroad Company vs. Matt Yurkonis. Petition for Writ of Error. F. W. Thomson, W. S. Jenney, Attorney- for Plaintiff in Error, Office and Post-Office address, 90 West Street, Borough of Manhattan, New York City. Due service of a copy of within is hereby admitted this — day of —, 19—. —, Att'y. To —, Esq., Attorney for —. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 8, 1915. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Federal
District.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Plaintiff in Error,
against

MATT YURKONIS, Defendant in Error.

Know all men by these presents, That we, The Delaware, Lackawanna and Western Railroad Company, having an office and principal place of business at No. 90 West Street, Borough of Manhattan, New York City, as Principal, and the Hartford Accident and Indemnity Company, having an office and principal place of business at No. 100 William Street, Borough of Manhattan, New York City, as Surety, are held and firmly bound unto the above named Matt Yurkonis, his successors, administrators and assigns, in the sum of Fifty Thousand Dollars (\$50,000.00), lawful money of the United States of America; to be paid to the said Matt Yurkonis, his successors, administrators and assigns; for the payment of which well and truly to be made, we jointly and severally bind ourselves, and our respective successors and assigns, firmly by these presents.

Sealed with our Seals and dated this Second day of February, one thousand nine hundred and fifteen.

Whereas, The Delaware, Lackawanna and Western Railroad Company has sued out a Writ of Error to the United States Supreme Court to reverse the judgment rendered in the above entitled suit by the District Court of the United States for the Eastern District of New York on or about the thirteenth day of May, 1914, for the sum of \$33,099.86, and to reverse the judgment and decree of the United States Circuit Court of Appeals for the Second Judicial District, made on the 22nd day of January, 1915, and entered in the office of the Clerk of said Court on January 26, 1915, affirming the judgment of said District Court and to reverse the judgment entered upon said mandate of the United States Circuit Court of Appeals in the said District Court Clerk's office on the 29th day of January, 1915, for \$25.70 costs;

Now, therefore, the condition of this obligation is such, that if the above named The Delaware, Lackawanna and Western Railroad Company shall prosecute said Writ of Error to effect and answer all costs and damages that may be awarded against it if it shall fail to make its plea good, then this obligation to be void, otherwise to remain in full force and virtue.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
By W. H. TRUESDALE, *President*.

Attest:

[SEAL.] A. D. CHAMBERS, *Secretary*.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY,
By PAUL RUTHERFORD, *Manager*.

Attest:

[SEAL.] ELLIOTT V. SOMERS,
Resident Assistant Secretary.

STATE OF NEW YORK,
County of New York,
City of New York, ss:

On this Second day of February, in the year one thousand nine hundred and fifteen, before me personally came W. H. Truesdale, who, being by me duly sworn, did depose and say: That he resides in Greenwich, Connecticut; that he is the President of The Delaware, Lackawanna and Western Railroad Company, one of the corporations described in and which executed the foregoing Instrument; that he knows the seal of said corporation; that the seal affixed to said Instrument is such corporate seal; that it was so affixed by order of the Board of Managers of said corporation, and that he signed his name thereto by like order.

[SEAL.]

JOSEPH FIELL,
Notary Public, No. 1077, New York County.

STATE OF NEW YORK,
County of New York, ss:

On February 2, 1915, before me personally came Paul Rutherford, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Manager of the Hartford Accident and Indemnity Company, the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and the said Paul Rutherford further said that he is acquainted with E. V. Somers and knows him to be the Resident Assistant Secretary of said company; that the signature of the said E. V. Somers subscribed to the within instrument is in the genuine handwriting of the said E. V. Somers and was subscribed thereto by him by like order of the Board of Directors and in the presence of him, the said Paul Rutherford; and that the Superintendent of Insurance of the State of New York has, pursuant to chapter 33 of the Laws of the State of New York for the year 1909, constituting chapter 28 of the Consolidated Laws of the State of New York as amended by chapter 182 of the Laws of the State of New York for the year 1913, issued to the Hartford Accident and Indemnity Company his certificate that said company is qualified to become and be accepted as surety or guarantor on all bonds, undertakings and other obligations or guarantees, as provided in the Insurance Law of the State of New York and all laws amendatory thereof and supplementary thereto; and that such certificate has not been revoked.

[SEAL.]

A. V. CRESPI,
Notary Public, New York County;
Notary Public, Kings County, 122;
N. Y. County, 138; Queens County, 730.

Expires 1916.

Assignment of Errors.

United States Circuit Court of Appeals for the Second Judicial District.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Plaintiff in Error,
against
MATT YURKONIS, Defendant in Error.

Now comes The Delaware, Lackawanna and Western Railroad Company, the Plaintiff in Error, by F. W. Thomson and W. S. Jenney, its Attorneys, and says, that in the above entitled cause there are manifest errors in the record and proceedings and for the purpose of having the same reviewed in the United States Supreme Court, file the following Assignment of Errors, upon which it will rely in its prosecution of the Writ of Error in the above entitled cause, to the United States Supreme Court, viz.: The United States Circuit Court of Appeals for the Second Judicial Circuit erred:

I.

In affirming the judgment and proceedings of the United States District Court for the Eastern District of New York in the above entitled action.

II.

In affirming the judgment of the said District Court and thereby denying the rights and defenses of the plaintiff in error which had been given to the said plaintiff in error by virtue of the Federal Employers' Liability Act of April 22, 1908, 35 Stat., 65, c. 149, as amended April 5, 1910, 36 Stat. 291, c. 143.

III.

In affirming the judgment of the said United States District Court on the ground that the said Federal Employers' Liability Act does not apply to this action.

IV.

In affirming the judgment of the said United States District Court on the ground, that the said Federal Employers' Liability Act does not apply to this action notwithstanding the proof in the record to the contrary, notwithstanding the agreement to the contrary of the parties to the action made upon the trial, which said agreement is spread upon the record, and notwithstanding the failure and refusal of the trial Court to decide the question of the applicability of the said Federal Statutes to this action.

V.

In affirming the judgment of the said United States District Court on the ground that the said Federal Employers' Liability Act

does not apply to this action notwithstanding the record which shows conclusively that the issue or question of the applicability of said Federal Statute was not tried out by the parties to the action at the trial, was excluded by the trial Court from its consideration and from the consideration of the jury, and was not decided upon in any way by the trial Court.

VI.

In affirming the judgment of the said United States District Court upon the ground that the said Federal Act does not apply to this action and thereby denying to the plaintiff in error its right to its day in Court upon said issue or question and an opportunity to offer its proof, material, relevant and competent thereto.

VII.

In affirming the judgment of the said United States District Court upon the ground that the said Federal Act does not apply to this action as such ground has no real or lawful basis of proof in the record.

VIII.

In affirming the judgment of the Trial Court on the grounds that the said Federal Act does not apply to this action and that the concession made by the plaintiff in error and confirmed and accepted by the defendant in error, that the parties were engaged in Interstate Commerce when the accident occurred was and is a stipulation to confer jurisdiction upon the Court.

IX.

In affirming the judgment of the Trial Court on the ground that the stipulation of the parties that the Federal Act was applicable, was made or accepted or confirmed by the defendant in error "inadvertently in the course of" the trial and that the said Circuit Court of Appeals had the jurisdiction or right or power to relieve the defendant in error from the effect of the same as an "inadvertency" on a review upon a Writ of Error sued out by the plaintiff in error.

X.

In affirming the judgment of the said United States District Court by sustaining the jurisdiction of the said Trial Court to render judgment in favor of the defendant in error.

XI.

In affirming the judgment of the said United States District Court and thereby sustaining the jurisdiction of the said Trial Court to render judgment in favor of the defendant in error in any common law or state cause or causes of action.

XII.

In affirming the judgment of the said United States District Court instead of reversing the said judgment and directing the said District Court to remand the action to the New York State Supreme Court for lack of jurisdiction in the said District Court.

XIII.

In affirming the judgment of the said United States District Court instead of reversing the said judgment and directing the said District Court to remand the action to the New York State Supreme Court for lack of jurisdiction in the said District Court, on the grounds that the record shows conclusively that the plaintiff in error is a Pennsylvania corporation and the defendant in error is not an alien.

XIV.

In not reversing the judgment of the Trial Court because of the error made by the Trial Court by its denial of the motion of the plaintiff in error made at the close of the case to direct a verdict for the plaintiff in error on the following grounds, viz.:

First. That the plaintiff has failed to show any negligence for which the defendant is liable as a matter of law.

Second. That the evidence shows conclusively that the plaintiff's injuries were caused wholly by his own negligence.

Third. That the plaintiff must be held as a matter of fact and of law, under the evidence, to have assumed the risks of being injured in the way and manner in which he was injured.

Fourth. That the sole proximate cause of the plaintiff's injuries was his own negligent acts in doing his work.

Fifth. That the evidence shows conclusively that the mine structure, ways, works and facilities, whatever their condition may have been at the time of the accident, are not relevant or material to this case.

Sixth. That the evidence shows conclusively that there was no explosion of accumulated gas in the chamber or working place where the plaintiff was working at the time of the accident.

Seventh. That the evidence shows conclusively that the plaintiff's injuries were not caused by anything directly or indirectly related to the ventilation of the mine.

Eighth. That the defendant owed no duty to the plaintiff to furnish plaintiff with anything except a properly ventilated place to work in.

Ninth. That the evidence shows conclusively that the defendant violated no legal duty towards the plaintiff.

Tenth. That the evidence shows conclusively that plaintiff's injuries were caused by an explosion of powder which he shot off himself, and that plaintiff was an expert miner, of long experience in handling explosives and in firing them off.

XV.

In not reversing the judgment of the Trial Court because of the errors of the Trial Court in refusing the requests to charge the jury made by the plaintiff in error, as follows, viz.:

First. "That the jury must find that the chamber in which plaintiff was injured was properly ventilated and was in proper condition as to ventilation and was reasonably safe, so far as ventilation may be considered in this case, when the plaintiff was injured and just prior thereto."

Second. "That the defendant's expert witnesses testified that the accident could not have occurred as a result of natural law under the circumstances and facts as testified to by the plaintiff. That the plaintiff was bound to produce some evidence in rebuttal to the defendant's evidence referred to. Plaintiff did not do so and therefore he failed to make out a cause of action in this case."

Third. "That it is conceded by both parties to the case as a matter of fact and law that at the time of the accident the plaintiff and defendant were engaged in Interstate Commerce."

Fourth. "That the evidence shows conclusively that the working place where plaintiff was injured had been provided with an adequate supply of pure air and ventilated by the ventilating apparatus, whatever the condition of said apparatus may have been, from the time plaintiff began work on July 6, 1911, until the moment when the plaintiff tested the place for gas, just prior to the accident."

Fifth. "That neither the Pennsylvania Statutes or the Common Law, so far as they may be considered as a measure of liability in this case, have anything to do with this case."

Sixth. "That there is no evidence in the case that plaintiff's injuries were caused or contributed to by any person for whose acts toward the plaintiff the defendant can be held liable as a matter of law."

Seventh. "That plaintiff was an experienced and expert miner, and assumed all the risks which he created himself by his work and by the way and manner in which he did his work."

Eighth. "That defendant is not liable for any failure of duty or any overt act of negligence upon the part of the mine foreman."

XVI.

In not reversing the judgment of the Trial Court because of the error of the Trial Court in refusing to grant the motion of the plaintiff in error for the direction of a verdict in its favor made upon the whole case and upon the charge of the Court, as modified.

XVII.

In not reversing the judgment of the Trial Court because of the error of the Trial Court in denying the motion of the plaintiff in error to set aside the verdict and grant a new trial, "(1), upon defendant's exceptions; (2), because the verdict was for excessive damages; (3), because the verdict was contrary to the evidence; and, (4), because the verdict was contrary to law."

At a regular and lawful meeting of the Board of Directors of the Hartford Accident and Indemnity Company, at which a quorum was present, held at the office of the company, in the City of Hartford, State of Connecticut, on the 7th day of July, A. D. 1914, on motion, it was unanimously

Resolved, that Paul Rutherford, Manager, or W. R. Wallace, Resident Vice-President, of the company, in the State of New York, be, and each of them is hereby authorized and empowered to execute and deliver, and to attach the seal of the company to any and all bonds and undertakings on behalf of the company in its business of guaranteeing the fidelity of persons holding places of public or private trust, guaranteeing the performance of contracts other than insurance policies, guaranteeing the performance of insurance contracts where surety bonds are accepted by states or municipalities, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed; such bonds and undertakings, however, to be attested in every instance by J. Frank Anderson, Resident Assistant Secretary, or Elliott B. Somers, Resident Assistant Secretary, or Francis A. Smith, Resident Assistant Secretary, as occasion may require.

STATE OF NEW YORK,

County of New York, ss:

I, E. V. Somers, Resident Assistant Secretary of the Hartford Accident and Indemnity Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said resolution, and that the same is still in full force and effect.

Given under my hand and the seal of the company, at the City of New York, on February 2, 1915.

[SEAL.]

ELLIOTT V. SOMERS,
Resident Assistant Secretary.

Hartford Accident and Indemnity Company.

Statement of December 31, 1913.

Assets.

Mortgage Loan on Real Estate.....	\$190,000.00
Bonds and Accrued Interest.....	1,279,118.73
Cash in Bank.....	78,762.08
Premiums in course of collection.....	4,385.06

\$1,552,265.82

Liabilities.

Capital Stock	\$750,000.00
Legal reserve	58,303.32
Loss and Claim reserve.....	511.00
Reserve for taxes, expenses, etc.....	4,000.00
Surplus	739,451.50

\$1,552,265.82

STATE OF NEW YORK,
County of New York, ss:

I, Paul Rutherford, Manager of the Hartford Accident and Indemnity Company, do hereby certify that the foregoing is a correct statement of the financial condition of said company, as of December 31, 1913, to the best of my knowledge and belief, and that the financial condition of said company is as favorable now as it was when said statement was made.

[SEAL.]

PAUL RUTHERFORD, *Manager.*

Subscribed and sworn to before me on February 2, 1915.

[SEAL.] A. V. CRESPI,

Notary Public, New York County;

Notary Public Kings County, 122;

N. Y. County, 138; Queens County, 730.

Expires 1916.

The within Bond is hereby approved as to form and sufficiency of sureties and is hereby accepted and allowed as supersedeas.

Dated: New York City, February 6th, 1915.

E. HENRY LACOMBE,

*Judge of the United States Circuit Court of
Appeals for the Second Judicial Circuit.*

Filed: February 8th, 1915.

Received this 8th day of February, 1915.

B. S. YANKAUS,

Attorney for Defendant in Error.

(Endorsed:) United States Circuit Court of Appeals for the Second Judicial District. The Delaware, Lackawanna and Western Railroad Company vs. Matt Yurkonis. (Copy.) Supersedeas Bond. F. W. Thomson, W. S. Jenney, Attorney- for Plaintiff in Error, Office and Post-Office Address, 90 West Street, Borough of Manhattan, New York City. Due service of a copy of within is hereby admitted this — day of —, 19—, —, Att'y. To —, Esq., Attorney for —. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 8, 1915. William Parkin, Clerk.

SIR: Please take notice, that the within is a true copy of an Supersedeas Bond this day duly filed in the office of the Clerk of this Court.

Dated, New York, Feb. 8, 1915.

Yours, &c.,

F. W. THOMSON,

W. S. JENNEY,

Attorneys for Pl'ff in Error.

Office and Post-Office Address, 90 West Street, Borough of Manhattan, City of New York.

And the said The Delaware, Lackawanna and Western Railroad Company Prays that the judgment aforesaid may be reversed and Judgment for the plaintiff in error be ordered on the merits, and that it may be restored to all things which it has lost by reason of the said Judgment.

Dated: New York City, February 5, 1915.

F. W. THOMSON,
W. S. JENNEY,

Attorneys for Plaintiff in Error.

Office and Post-Office Address, No. 90 West Street, Borough of Manhattan, New York City.

Filed, February 8, 1915.

(Endorsed:) United States Circuit Court of Appeals for the Second Judicial District. The Delaware, Lackawanna and Western Railroad Company vs. Matt Yurkonis. (Copy.) Assignment of Errors. F. W. Thomson, W. S. Jenney, Attorney for Plaintiff in Error, Office and Post-Office Address, 90 West Street, Borough of Manhattan, New York City. Due service of a copy of within is hereby admitted this — day of —, 19—. —, Att'y. To —, Esq., Attorney for —. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 8, 1915. William Parkin, Clerk.

UNITED STATES OF AMERICA,

Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 395 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Delaware, Lackawanna and Western Railroad Company against Matt Yurkonis as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 10th day of February in the year of our Lord One Thousand Nine Hundred and fifteen and of the Independence of the said United States the One Hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

Revenue stamp.

UNITED STATES OF AMERICA, ss:

To Matt Yurkonis, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's office of the United States Circuit Court of Ap-

peals for the Second Judicial District, wherein The Delaware, Lackawanna and Western Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. Henry Lacombe, Judge of the United States Circuit Court of Appeals for the Second Judicial District, this 6th day of February, in the year of our Lord one thousand nine hundred and fifteen.

E. HENRY LACOMBE,
*Judge of the United States Circuit Court of
Appeals for the Second Judicial District.*

Received and filed February 8th, 1915.

Copy received.

Dated: New York City, N. Y., February 8th, 1915.

B. S. YANKAUS,
Attorney for Defendant in Error.

[Endorsed:] United States Circuit Court of Appeals for the Second Judicial District. The Delaware, Lackawanna and Western Railroad Company vs. Matt Yurkonis. 5173. Citation. F. W. Thomson, W. S. Jenney, Attorney- for Plaintiff in Error, Office and Post-Office Address, 90 West Street, Borough of Manhattan, New York City. Due service of a copy of within is hereby admitted this — day of —, 19—. —, Att'y. To —, Esq., Attorney for —. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 8, 1915. William Parkin, Clerk.

Writ of Error.

UNITED STATES OF AMERICA:

The President of the United States of America to the United States Circuit Court of Appeals for the second Judicial Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the United States Circuit Court of Appeals for the Second Judicial Circuit, before you, or some of you, between The Delaware, Lackawanna and Western Railroad Company, Plaintiff in error, and Matt Yurkonis, Defendant in Error, a manifest error hath happened, to the great damage of the said The Delaware, Lackawanna and Western Railroad Company, as is said and appears by its complaint, we, being willing that such error, if any, hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal

distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, at the City of Washington, D. C., together with this Writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty (30) days from the date hereof; that the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable E. Henry Lacombe, United States Circuit Court Judge for the Second Judicial Circuit, this Sixth day of February, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,

*Clerk of the United States Circuit Court of
Appeals for the Second Judicial Circuit.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,

*Judge of the United States Circuit Court of
Appeals for the Second Judicial Circuit.*

Filed: February 8th, 1915.

[Endorsed:] United States Circuit Court of Appeals for the Second Judicial Circuit. The Delaware, Lackawanna and Western Railroad Company vs. Matt Yurkonis. 5173. (Original.) Writ of Error. F. W. Thomson, W. S. Jenney, Attorney for Plaintiff in Error, Office and Post-Office Address, 90 West Street, Borough of Manhattan, New York City. Due service of a copy of within is hereby admitted this — day of —, 19—. —, Att'y. To —, Esq., Attorney for —. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 8, 1915. William Parkin, Clerk.

Endorsed on cover: File No. 24,596. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 852. The Delaware, Lackawanna & Western Railroad Company, plaintiff in error, vs. Matt Yurkonis. Filed March 2d, 1915. File No. 24,596.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1914.

THE DELAWARE, LACKAWANNA
AND WESTERN RAILROAD COM-
PANY,

Plaintiff-in-Error,

against

MATT YURKONIS,
Defendant-in-Error.

No. 852.

**Brief of Plaintiff-in-Error Against Motion
to Dismiss Writ of Error, Etc., Etc.**

The defendant-in-error moves as follows, viz.:

First. That the writ of error herein be dismissed on the ground that the judgment of the Circuit Court of Appeals was final and cannot be reviewed here by writ of error.

He further moves, provided the motion to dismiss is denied,

Second. That the judgment below be affirmed on the grounds:

(a) That, manifestly, the writ was taken for delay only; and

(b) That the questions arising on the assignments of error are manifestly frivolous.

He further moves, provided none of the above motions be granted.

Third. That the cause be ordered to a summary docket for argument.

SYNOPSIS OF UNDISPUTED FACTS SHOWING THE HISTORY OF THE CASE.

The defendant-in-error is a corporation, organized under the laws of the State of Pennsylvania. For a great many years, it has been engaged in operating a steam railroad as a common carrier between Hoboken, in the State of New Jersey, to Scranton, in the State of Pennsylvania, and to Buffalo, its western terminus, in the State of New York. Also, pursuant to its charter rights, for a long period of time, it has been a producer of anthracite coal in Pennsylvania.

On July 6, 1911, the defendant-in-error, Matt Yurkonis, while employed as a coal miner in one of the railroad's coal mines, near Scranton, Pennsylvania, was injured by the explosion of a blast which he, himself, had loaded and fired.

Yurkonis was born in Lithuania, Russia, came to the United States at about the age of seventeen and began working in the coal mines about three years after his arrival (fols. 281-282). At the time of the accident he had been a certified coal miner for about twenty years (fol. 284), and had worked in the mine where he was hurt, for eighteen years (fol. 194). And he had been a citizen of the United States and of the State of Pennsylvania for ten or twelve years (fol. 194).

On May 7, 1913, he, as plaintiff, began an action against the Railroad Company, as defendant, to re-

cover damages, alleging that his personal injuries were caused by the actionable negligence of the defendant, its agents and employees. Notwithstanding the facts that the cause of action arose in Pennsylvania; that all parties concerned were residents and citizens of the State of Pennsylvania, Yurkonis brought his action in the Supreme Court of the State of New York, through a New York State attorney at law, and placed the venue of the action in Richmond County, which is comprised entirely of Staten Island in New York Harbor (*see Summons*, fol. 6).

The defendant Railroad Company, believing that Yurkonis was an alien and that a trial of the action in Richmond County in the New York State Court was undesirable, both because of the great inconvenience of the place and because of the lack of experience of the New York State Courts in trying coal-mining cases and in construing the statutes of Pennsylvania relating to the mining of anthracite coal, removed the action to the United States District Court for the Eastern District of New York, which holds its terms at Brooklyn.

The Railroad Company filed its answer to the complaint on May 27, 1913. Although, it afterwards appeared that the plaintiff-below was not an alien but a citizen of the State of Pennsylvania and therefore that there were no grounds for removing the action from the State Court, no motion to remand was made.

The case duly appeared upon the day calendar at the October, 1913, Trial Term of the United States District Court. Upon the call of the calendar, the defendant-below answered "ready," but the plaintiff-below requested a continuance on the ground that he desired to make a formal motion

for permission to file an amended complaint. The continuance was granted. The motion for permission to amend was made and granted. An amended complaint was filed on October 17, 1913, which set forth a cause of action under the Federal Employers' Liability Act (fols. 73-74).

The defendant-below filed its answer to the amended complaint on November 3, 1913, and pleaded as one of its defenses that the cause of action under the Federal Act was barred by the time limitation of two (2) years as set forth in that statute (fol. 119).

Upon the pleadings as amended the case came to trial on March 30, 1914. The jury rendered a verdict of \$50,000 against the defendant Railroad Company. The Trial Court reduced the amount of the verdict by \$14,000 to \$36,000 for which, with costs, a judgment in favor of the plaintiff-below was entered in the office of the Clerk of the United States District Court for the Eastern District of New York on May 13, 1914 (fols. 130-131).

Upon a review by writ of error to the United States Circuit Court of Appeals for the Second Judicial Circuit, the judgment of the Trial Court was affirmed, and thereupon the plaintiff-in-error sued out a writ of error to the United States Supreme Court, wherein the record was filed and the case docketed on March 2, 1915.

On April 9, 1915, defendant-in-error served this motion to dismiss, etc.

NOTE. The attention of the Court at the outset is respectfully called to the following, viz.:

- (1) That this case falls within the class known as "Imported Litigation." The case was imported from the State of Pennsylvania, its

natural jurisdiction, into the State of New York, in violation of sound public policy.

Hoes v. N. Y. N. H. & H. R. R. Co., 173 N. Y. 435.

In the Hoes case, Judge Bartlett delivering the opinion of the Court of Appeals, says:

"Is it possible, by a device so simple and transparent as the one here disclosed, to confer upon the Supreme Court of this State jurisdiction to try a negligence action having its origin in the State of Connecticut and between a corporation and residents of that State?

"If this can be done it will open wide the flood gates of litigation in similar cases, establish a new legal industry and impose thereby upon our already overworked courts the obligation to try actions imported from a foreign jurisdiction."

FIRST POINT.

The writ of error should not be dismissed.

As the motion to dismiss, etc., is made upon "the record in this case filed in this Court and docketed on or about March 2, 1915," the motion will be denied, (1), if the record "*shows on its face* that a Federal question properly reviewable by this Court upon a writ of error has been raised therein; and, (2), if the Federal questions raised are raised in good faith and have apparent merit.

In order to determine the merits of this motion, the record upon which it is made will be examined but it must be assumed that such an examination will be, nay, must be more limited than the examination of a record after briefs have been submitted

and argument has been had upon the errors assigned.

A most general review of the record will show quickly that Federal questions, reviewable by writ of error, are raised.

FIRST FEDERAL QUESTION.

Upon the record as filed, is the Federal Employers' Liability Act the legal measure of the rights and liabilities of the parties to the action?

First. The plaintiff-below in his amended complaint, alleges as follows, at folios 72-75:

(a) "That the defendant is and at all the times hereinafter mentioned, was a common carrier, engaged in interstate commerce by railroad."

(b) "That, at all the times hereinafter mentioned, the defendant did * * * own, operate, manage and control for the *sole* purposes of its said railroad, and as appurtenant thereto and part of its works and equipment in connection therewith * * * the 'Pettibone Colliery' * * * where, at all of said times, it did * * * mine and prepare anthracite coal for use in its locomotives * * * used in its said business as a common carrier engaged in interstate commerce by railroad."

(c) "That at all the times hereinafter mentioned and *more particularly at the time* of the happening of the accident hereinafter described, the plaintiff was employed by the defendant at its said mine or colliery, *in such interstate commerce as aforesaid.*"

Second. Upon the trial and when the plaintiff below was endeavoring to prove, by the testimony

of a witness, the facts alleged in his complaint as just hereinbefore quoted, and had actually proved facts related to the "interstate commerce" features of the case and the application thereto of the Federal Employers' Liability Act, the defendant below made the following concession of facts and law, viz. (see fols. 416-418):

"*Mr. Thomson*: At this time, the defendant concedes that it mines the coal which it uses in its locomotives in Interstate Commerce and that *as a matter of fact and a matter of law the coal which Mr. Yurkonis was mining was used in that way*, and that *we were engaged in Interstate Commerce*.

"*Mr. O'Neill*: This particular coal was not for the market?

"*Mr. Thomson*: No, we were both engaged in Interstate Commerce *at the time* the injury occurred.

"*The Court*: That is, the Railroad Company was engaged in business that would be interstate commerce and was getting its coal for its own purposes?

"*Mr. O'Neill*: Yes."

It is important to note while reading the above quoted portion of the record that the concession of fact and law contained therein was made while the trial counsel of the plaintiff below, Mr. O'Neill, *was engaged in recording evidence* to uphold the "Interstate Commerce and Federal Employers' Liability Act" allegations in the amended complaint and it is of still further importance to note that the concessions, both of the facts alleged and of the application of the Federal Law, were received and accepted by Mr. O'Neill, and that he immediately ceased to offer or seek further evidence in that regard because the concessions made and accepted became binding upon the par-

ties and eliminated the issue of both fact and law in respect to the Interstate Commerce feature and the application of the Federal Employers' Liability Act as a measure of the rights of the parties to the action.

Third. Upon the trial, at the close of the case (see fols. 835-836) the defendant below upon the record, moved for the direction of a verdict for the defendant on the ground that the record showed conclusively:

"(1) The parties to the action were both engaged in interstate commerce when the plaintiff below received his injuries;

"(2) The rights and liabilities of the parties were therefore measured and controlled by the Federal Employers' Liability Act;

"(3) More than two years had expired after the cause of action arose before the plaintiff below had begun his action and his right to recover was barred by the limitation contained in the Act"

It will be noted that the Court denied the motion on the ground that the Federal Employers' Liability Act was not exclusive (fols. 845-862), and that an exception to such denial was duly taken (fol. 865).

Fourth. Notwithstanding that upon the face of the record as to the fact and law the cause of action tried was one controlled by the Federal Employers' Liability Act, the Court ruled as follows, viz. (see fol. 851):

"*The Court:* The statute is in derogation of the common law. It means, taking it strictly, that during the period of two years he is given a cause of action which will super-

sede other causes of action that might bring the Federal and State Laws in conflict; that if that cause of action is lost then, whether or not he still is given rights by the State Law would be unaffected by the Federal legislation." And (see fols. 853-854): "Here, the liability statute merely gives, as against the defendant, an extension of a further right to bring a suit. If that is lost, the defendant gains the benefit of the cessation of the right. I do not see that that supersedes the question as to whether the defendant must litigate some liability that is present under other statutes or under the law generally that is not affected by the Federal Statute." And (see fols. 861-862), "but where the Federal Statute gives an additional right (that is, different from the right which exists under the State Statute), then the Statute of Limitations as to each would govern its operation, and if a Federal Law creates a certain privilege or right limited to two years and a lesser right is given by the State Statute for five years, then it doesn't seem to me that the Federal legislation would interfere with the exercise of that lesser right during the three years after the Federal Statute had run. Now, whether you would draw the statute line as to a particular statute one way or the other is another question. In the present case, I think that the two are consistent and that it is only the increased right which has been given for the space of two years by the Federal Statute."

By virtue of the above quoted statements made by the Trial Judge it is easily seen that, in substance, the Trial Court held as a matter of law:

- (1) That the plaintiff below was barred from recovering under the Federal Employers' Liability Act because his action had been be-

gun more than two years after his cause of action had arisen;

(2) But that the Federal Act was not exclusive,

and the Trial Court overruling the objections of the defendant below, submitted the case to the jury under the Pennsylvania State Law and the common law, thereby denying to the plaintiff-in-error the rights granted to it by the Federal Employers' Liability Act.

Fifth. The plaintiff-in-error sued out a writ of error to the United States Circuit Court of Appeals which reviewed the judgment and the proceedings of the Trial Court. The Federal questions hereinbefore described were raised there by the assignment of errors (see fols. 1049-1052, 1056, 1063), and were argued and considered and decided.

The Appellate Court affirmed the judgment of the Trial Court but practically reversed the rulings of the Trial Court. Yet the result achieved so far as the rights of the plaintiff-in-error were concerned was the same, viz.: The denial of those rights.

The Circuit Court of Appeals held that the Federal Act was exclusive but that it was not applicable to the case.

The Trial Court had held that the Act, if applicable, was not exclusive.

Sixth. From the above, the Court will observe that the plaintiff-in-error made two contentions upon the trial, viz.:

(1) That the Federal Employers' Liability Act was applicable to the case as tried;

(2) That the Federal Employers' Liability Act was exclusive of State and common law;

and that the Trial Court either sustained the first contention or refused to decide upon it and the United States Circuit Court of Appeals sustained the second contention but both lower Courts refused to sustain both contentions.

Seventh. Upon the affirmance of the judgment of the Trial Court by the Appellate Court, the plaintiff-in-error sued out the writ of error to this Court and the same Federal questions which were raised in the two lower Courts are now before the Supreme Court (*see Assignments of Error* at pp. 377-380).

It is settled law that when a judgment of the United States Circuit Court of Appeals denies to a party to an action at law a right conferred by a Federal Statute, the party aggrieved may have such judgment reviewed by the United States Supreme Court upon a writ of error.

Atch., T. & S. F. Ry. Co. v. Robinson,
233 U. S., 173.

Seaboard Air Line Ry. Co. v. Horton,
233 U. S., 492.

Henningsen et al. v. U. S. Fidelity & G. Co., 208 U. S., 404.

THE FACE OF THE RECORD SHOWS AS FOLLOWS, VIZ.:

1. That the plaintiff-below pleaded that Federal Employers' Liability Act was applicable to his case.

2. That the plaintiff-below pleaded the Federal Act, deliberately, after due consideration.

3. In order to plead the Federal Act, it was

necessary for the plaintiff-below to obtain permission, through a formal motion, to amend his original complaint and to suffer a delay of six months in the trial of his action.

4. Upon the trial, the plaintiff, relying upon the Federal Act, to escape the dangers of the defense of contributory negligence, brought out some proof in support of his pleading.

5. While the plaintiff was engaged in recording evidence to uphold his pleading as to the application of the Federal Act, its application, as well as the facts necessary thereto, were conceded by the defendant-below, and the concessions were accepted by the plaintiff.

6. That the face of the record shows no issue either of fact or law, in respect to the application of the Federal Act to the case.

7. That the defendant-below pleaded the limitation in the Federal Act in its answer to the amended complaint as an absolute defense. Therefore, there was no element of surprise or inadvertency in the situation.

8. The cause of action tried was the cause under the Federal Act.

9. The evidence of and the reference to the Pennsylvania Statutes were necessary only for the sole purpose of showing violations of such laws as an element of either negligence or contributory negligence and not for the purpose of showing or basing any claim that the Federal Act did not control the question of liability.

10. That the plaintiff-below held to the application of the Federal Statute until the evidence

was closed, and the motion to direct a verdict for the defendant on the ground, that the two years' limit barred recovery, was made and discussed.

11. When, after hearing argument on the motion, the plaintiff-below became convinced that the two years' limit was effective and would defeat him, he began for the first time to claim the inapplicability of the Federal Act, and now alleges the absurdity of his amended complaint and of his previous contentions.

THE ERRORS OF THE LOWER COURTS.

With the face of the record showing only the application of the Federal Act because of the proof and the recorded and accepted concessions of fact and law in respect thereto,

THE TRIAL COURT DECIDED,

1. That the Federal Act, if applicable, was not exclusive; and, therefore,
2. That it was unnecessary for the Trial Court to pass upon the question of its applicability;
3. That no decision or finding should be made in respect to the applicability of the Federal statute as under its finding that the act was not exclusive, a decision as to its applicability was immaterial.

THE UNITED STATES CIRCUIT COURT OF APPEALS DECIDED:

1. That the Trial Court erred in finding that the Federal Act, if applicable, was not exclusive;
2. That the Federal Act was not applicable.

The plaintiff-in-error contends that as the Trial

Court refused to pass upon the issue of law in respect to the application of the act, the United States Circuit Court of Appeals had no jurisdiction in a review upon a writ of error taken out by the defendant below, to originate or make the finding that the Federal Act was not applicable. The only jurisdiction the Appellate Court possessed was to review the acts of the Trial Court. The finding of law as to applicability of the act must be tried out in Trial Court and must be passed upon in the first instance by the Trial Court. A judgment not based upon a certain finding and based upon error cannot be sustained by the findings made outside of the record by the Appellate Court.

It will be noted here by this Court, that a new and an additional finding was interjected by the Circuit Court of Appeals and that such act was accomplished by striking the concessions referred to, together with a part of the proof, from the record.

In other words, the United States Circuit Court of Appeals decided :

1. That in spite of the face of the record the Federal Act was inapplicable; and, further,

2. That even if the issue as to the application of the act had been in the case and even if all the proof in the world were upon the record and the issue thoroughly tried out, still only one decision could be possible, viz., that the act was inapplicable.

From the above, there can be but one conclusion. The decision of the Circuit Court of Appeals was without jurisdiction; was not based on the record but upon what the record might be if a new trial was had; and barred the plaintiff-in-error from its

day in Court, its opportunity to show all the facts, all the evidence upon which it might ask the Court to find upon the issue that the Federal Act was applicable. The plaintiff-in-error is at least entitled to a trial, to its day in Court upon all the issues and cannot be lawfully deprived thereof by the United States Circuit Court of Appeals.

By the quotations from the record hereinbefore set forth, it has been demonstrated conclusively that, upon the face of the record the plaintiff-in-error is contending lawfully that it has suffered because of a denial of its Federal rights by the lower Courts.

By the previous decisions of this Supreme Court hereinbefore cited, it is also conclusively certain that the judgment below can be reviewed by a writ of error. As the judgment below may perhaps stand if the Federal Act is not applicable, but falls certainly if said act is applicable, the judgment in respect to the application of the Federal Act is not a final judgment, or, in other words, is not a judgment which can be reviewed only by certiorari.

Mo., K. & T. R. R. Co. v. Wulf, 226 U. S., 570.

AN ANALYSIS OF DEFENDANT-IN-ERROR'S BRIEF AND THE LAW RELIED UPON IN SUPPORT OF MOTION.

The argument of defendant-in-error is based upon the following assertion (Defendant-in-Error's Motion to Dismiss, p. 12) :

"If the plaintiff asserts jurisdiction on the ground that the case is one arising under the laws of the United States and also upon the ground of diversity of citizenship, and he fails to state or prove a case involving a Federal

question, the decision of the Circuit Court of Appeals is final, and can only be reviewed on certiorari."

An examination of the cases cited in support of this proposition shows that they do not sustain it. The first case is:

Bankers Co. v. Minneapolis, etc., R. R. Co., 192 U. S., 371.

This was an action brought against a railroad company to recover for the loss of money taken from a mailbag while in the custody of the railroad and the only Federal act involved was the postal law requiring the railroad company to deliver the mails to post offices located not more than eighty rods from the nearest railroad station. The Court said, at page 382:

"It will be perceived that plaintiff relied on principles of general law applicable to negligence, and to the liability of the defendant if there was negligence, and nowhere asserted a right which might be defeated or sustained by one or another construction of the Constitution or of any law of the United States
* * *."

At page 383:

"In other words, no definite issue in respect of a right claimed under the Constitution, or any law of the United States, was deducible from plaintiff's statement of its case, and if the postal regulations could, under circumstances, be regarded as laws of the United States creating a right which might be denied or secured according to one construction or another, it did not appear that the construction of the extract from Section 713 of those regulations was in any way in dispute or could have been;

and the averments of the complaint cannot be helped out by resort to the other pleadings or to judicial knowledge."

At page 385 the Court says:

"We repeat that the rule is settled that a case does not arise under the Constitution or laws of the United States unless it appears from plaintiff's own statement, in the outset, that some title, right, privilege or immunity on which recovery depends will be defeated by one construction of the Constitution or laws of the United States, or sustained by the opposite construction."

The Court then held that in this particular case the jurisdiction of the Circuit Court depended entirely on diversity of citizenship.

The case is easily distinguishable from the case at bar because, while the plaintiff's amended complaint referred to a postal law or regulation, no claim for recovery was based thereon, nor was the construction of the postal law in any way involved in the case. In the case at bar, the plaintiff's amended complaint sets forth the Employers' Liability Act and claims a right of recovery by virtue of its provisions, and one of the grounds of recovery alleged is a right under that statute. The Court below held that the statute did not apply, which was "defeating by one construction of the laws of the United States one of plaintiff's claims."

The case cited is authority for the plaintiff-in-error in the case at bar to the effect that the amended complaint is to be considered the original pleading so far as to come within the rule requiring the original jurisdiction of the Court to depend upon other grounds than mere diversity of citizenship.

The second case cited by defendant-in-error on page 12, is:

Pope v. Louisville, etc., Co., 173 U. S., 573.

In this case an action was brought by a Receiver appointed by a Circuit Court. The suits in which this Receiver was appointed were in the nature of creditors' bills, and the only ground of Federal jurisdiction set up in them was diversity of citizenship. Therefore, the decree of the Circuit Court of Appeals is final.

This case is distinguishable from the case at bar because the plaintiff's claim as shown by his bill and amended bill in no way depended upon the construction of any law of the United States, but solely upon the diversity of citizenship. In the case at bar the plaintiff's amended statement distinctly averred a right of action under the Federal Employers' Liability statute.

The third case cited by the defendant-in-error (p. 12) is:

Press Publishing Co. v. Monroe, 164 U. S., 105.

This was an action between citizens of different States brought in the Circuit Court for the violation of an author's common law right in his published manuscript. The defendant relied on the Constitution and laws of the United States concerning copyrights and it was held that after judgment against the defendant in the Circuit Court and he has taken the case by writ of error to the Circuit Court of Appeals, the defendant is not entitled as of right to have its judgment reviewed by the Supreme Court.

In this case, again, the plaintiff's bill made no

claim under any Federal statute and the Federal statute was brought in only by the defendant.

The defendant-in-error then cites Loveland's Appellate Jurisdiction, Section 275, where it is said, *inter alia*:

"If the jurisdiction of the Circuit Court or District Court was founded in whole or in part upon any other ground" [other than diversity of citizenship or a case arising under the patent laws or revenue laws or criminal law or in admiralty], "the decision of the Circuit Court of Appeals is not final, and may be reviewed by the Supreme Court on writ of error or appeal."

The cases cited by the defendant-in-error do not hold, therefore, that if the plaintiff fails "to state or prove a case involving a Federal question, the decision of the Circuit Court of Appeals is final and can only be reviewed on certiorari."

The most that the cases hold is that if the plaintiff fails to state a case involving a Federal question, the decision of the Circuit Court of Appeals is final.

The defendant-in-error, at page 12, says:

"Where the jurisdiction of the United States Court is originally invoked as here upon the ground of diversity of citizenship, it will not be held to rest also on the ground that the suit arose under the Constitution of the United States unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form such as is required in good pleading."

In support of this the defendant-in-error cites two cases:

Empire State Mining Co. v. Hanley, 198
U. S., 292.

The syllabus in this case is as follows:

"Where the jurisdiction of the Circuit Court is invoked on the ground of diverse citizenship, it will not be held to rest also on the ground that the suit arose under the Constitution of the United States, unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form such as good pleading requires and where the case is not brought within this rule the decree of the Circuit Court of Appeals is final.

"Where the jurisdiction of the Circuit Court has been invoked on the ground of diverse citizenship and plaintiff asserts two causes of action, only one of which involves a right under the Constitution, and the Circuit Court of Appeals decides against him on that cause of action and in his favor on the other, the judgment of that Court is final and defendant cannot make the alleged constitutional question on which he has succeeded the basis of jurisdiction for an appeal to this Court."

This syllabus of the case is broader than the decision. As Mr. Chief Justice Fuller says, at page 297:

"The Constitution and laws of the United States were not mentioned in the complaint, nor any dispute or controversy raised as to the effect or construction of the Constitution or laws on the determination of which the

result depended; nor was any title, right, privilege or immunity specially set up or claimed under Constitution or law."

And again, at page 298:

"If the allegation of diversity of citizenship had been omitted from the bill, the jurisdiction could not have been maintained.

"The decisions of the Court below did not turn on any Federal question."

In the case at bar the amended statement did set up a claim under a Federal Statute, and upon the filing of the amended complaint with that allegation in it the Court would have retained jurisdiction even "if the allegation of diversity of citizenship had been omitted from the bill."

The other case cited by the defendant-in-error at page 12, is:

Arbuckle v. Blackburn, 191 U. S., 405,

where it was held:

"Where the jurisdiction of the Circuit Court is invoked on the ground of diverse citizenship it will not be held to rest also on the ground that the suit arose under the Constitution of the United States unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form such as good pleading requires; and where the case is not brought within this rule the decree of the Circuit Court of Appeals is final."

This was an action brought by the plaintiffs against the State Dairy and Food Commissioner of Ohio to restrain him from enforcing certain

provisions of the Pure Food Laws of the State of Ohio. The Supreme Court in dismissing the appeal held that the jurisdiction of the Circuit Court was dependent entirely upon diversity of citizenship. The Court said, by Mr. Chief Justice Fuller, at page 413:

"In the present case the Circuit Court had jurisdiction on the ground of diverse citizenship, but it is now contended that jurisdiction also rested on the ground that the suit was one arising under the Constitution of the United States.

"The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form such as is required in good pleading. *Defiance Water Company v. City of Defiance*, ante, p. 184, and cases cited.

"The averments of this bill did not bring the case within that rule for they put forward no existing controversy as to the effect or construction of the Constitution, on which the relief depended, and set up no right which might be defeated or sustained according to such construction."

Again, on page 414:

"It is not asserted that this police regulation is in contravention of the Constitution of the United States, but it is said that when the Commissioner, in the discharge of his duty under the law, reached the conclusion that the coating of Ariosa with a glaze of sugar and eggs was calculated to conceal damage or inferiority, and to make the article appear better or of greater value than it really was, and that the article was not a compound or mixture, and proposed to prosecute, he thereby con-

strued the act in a way, which, if his construction were correct, would render it unconstitutional.

"But these were findings of fact which resulted in bringing the article within the prohibition and excluded it from the proviso, and neither findings nor prosecutions would in themselves constitute a deprivation of property, or a denial of the equal protection of the law, by the State, or any direct interference with interstate commerce, and the constitutionality of the statute was conceded.

"The suggested controversy was purely hypothetical and based the supposed constitutional objections on the contingency that, on issues of fact, it might be judicially determined that Ariosa came within the statute which complainants denied.

"If the Commissioner's conclusions were erroneous, the Courts were open for the correction of the error, and the possibility that they might agree with the Commissioner could not be laid hold of as tantamount to an actual controversy as to the effect of the Constitution, on the determination of which the result of the present suit depended. Indeed, in the only case called to our attention by counsel involving the status of Ariosa, the Court of Common Pleas of Lucas County, Ohio, held that it was not within the prohibition of the statute. *White v. Ohio, Nisi Prius Decisions*, 659."

The distinction between the foregoing case and the case at bar is in the application of the general principal of law stated in the syllabus above quoted, In the case at bar the plaintiff did allege a cause of action under a Federal Statute, and attempted to prove facts at the trial which would bring him within the Federal Statute. After starting to prove these facts he was relieved of the necessity of proving them further by the concession of the defendant.

The statement is made in defendant-in-error's book, page 13, that "the sole ground of such a contention (that the Federal Liability Act was involved) is the so-called stipulation or concession made, not by the plaintiff, but by the defendant, to the effect that the parties were engaged in interstate commerce."

This is not accurate, as the stipulation or concession merely dispensed with further proof of facts. The ground of jurisdiction was formally alleged in the plaintiff's complaint and the Federal Court had jurisdiction on that ground alone to determine whether or not, under the facts as proved and admitted, the act applied.

The defendant-in-error further says, page 13:

"It is a case where the Federal Act did not apply, and unless the parties had been of diverse citizenship, the Federal Court would have been under obligation to remand the case to the State Court."

It is true that by the decision of the Circuit Court of Appeals, the Federal Act did not apply under their construction of that act, but it is that very decision that the Federal Act did not apply from which this appeal is taken.

Defendant-in-error then cites *Minnesota v. Northern Securities Co.*, 194 U. S., 48. The extracts therefrom, however, on their face do not apply to the case at bar so as to defeat the right of appeal. On the contrary they support it.

The defendant-in-error then, at page 14, says:

"If the ground of jurisdiction in the suit as originally begun is one in respect to which the decision of the Circuit Court of Appeals is final, even the fact that some Federal question is subsequently brought into the case does not

make it reviewable here by a writ of error. It can only be reviewed by certiorari."

Three cases are cited in support of this proposition, of which the first is:

Colorado, etc., Co. v. Turck, 150 U. S., 138,

In this case the Court held:

"When the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character, of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked.

"When the jurisdiction of a Circuit Court is invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case."

In this case the suit was in ejectment and as appears on page 142, the complaint alleged the diverse citizenship of the parties as the ground of jurisdiction.

In the case at bar the plaintiff's amended complaint, which becomes the original pleading upon which he bases his right to recover, whether the amended pleading be filed before or after removal, discloses and sets up a ground of Federal jurisdiction in addition to the jurisdiction dependent upon diversity of citizenship.

In the second case cited, *ex parte Jones*, 164 U. S., 691, it was held that where the diversity of citi-

zenship was the sole question for jurisdiction, "the jurisdiction of the Court of Appeals of the Circuit is final, even though another ground for jurisdiction in the Circuit Court be developed in the course of the proceedings." The Court said at page 693:

"In this case the original bill averred the complainant to be a citizen of Pennsylvania and the defendant to be a national bank, duly established under the laws of the United States, having its place of business at Boston, and a citizen of the State of Massachusetts. As the bill was filed after the Act of 1888 took effect, it must be deemed to be a suit dependent upon citizenship alone. But even if another ground were developed in the course of the proceedings, the judgment of the Court of Appeals would be final if the jurisdiction of the Circuit Court were originally invoked solely upon the ground of citizenship" *Colorado Central Mining Co. v. Turck*, 150 U. S., 138; *Borgmeyer v. Idler*, 159 U. S., 408.

The case at bar is distinguishable because in it the *plaintiff's pleadings set up* the additional ground of jurisdiction, which is not true in the case of *Ex parte Jones*, nor in the *Colorado Co. against Turck*, 150 U. S., 138, cited in *Ex parte Jones*, *supra*.

The defendant-in-error then cites *Third Street Co. v. Lewis*, 173 U. S., 457, and quotes the third paragraph of the headnote. The second paragraph of the headnote, however, shows that the case is not applicable to the case at bar, the second paragraph being as follows:

"If it does not appear at the outset that a suit is one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance, the suit must be dis-

missed; and lack of jurisdiction cannot be supplied by anything set up by way of defense."

The plaintiff's pleadings, so far as they applied to the plaintiff's cause of action alleged no ground for Federal jurisdiction except diversity of citizenship, and the Court said at page 460, in speaking of the averments of the plaintiff's bill regarding acquisition of interest in the property by appellant, that:

"The averments, however, in respect to the acquisition of its interest by appellant, *were no part of plaintiff's case*, and if there had been no allegation of diverse citizenship the bill unquestionably could not have been retained."

In the case at bar the amended complaint did confer jurisdiction, because it claimed a right under a Federal Act, and diversity of citizenship was no longer the sole ground for Federal jurisdiction on plaintiff's own pleading.

In *Western Union Telegraph Co. v. Ann Arbor R. R. Co.*, 178 U. S., 239, cited by defendant-in-error, page 15, the syllabus of the case is:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the Constitution and laws; and it must appear on the record by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution, or some law or treaty of the United States, before jurisdiction can be maintained on this ground."

The Court, at page 244, referring to the above statement of the law, says:

"We are unable to perceive that Paragraphs Sixth and Seventh met this requirement, and it does not appear to us that they were intended to do so by the pleader. As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction."

This statement from the Court shows the distinction on the facts between this case and the case at bar.

Defendant-in-error then cites *Spencer v. Silk Co.*, 191 U. S., 526, where it was held:

"A suit does not arise under the Constitution and laws of the United States unless a dispute or controversy as to the effect or construction thereof, upon the determination of which the result depends, appears in the record by the plaintiff's pleading.

"Where jurisdiction of the Circuit Court is rested on diverse citizenship and plaintiff relies wholly on a common law right, the fact that defendant invokes the Constitution and laws of the United States does not make the action one arising under the Constitution and laws of the United States and the judgment of the Circuit Court of Appeals is final.

"Where a trustee in bankruptcy commences an action in the State Court, its removal on the ground of diverse citizenship places it in the Circuit Court as if it had been commenced there on that ground of jurisdiction and not as if it had been commenced there by consent of defendant under Section 23 of the Bankruptcy Act."

In this case again it was the defendant that invoked the Constitution and laws of the United States, while in the case at bar it is the plaintiff in his statement of his cause of action who sets up a claim under a Federal Statute. In the case at bar the jurisdiction of the Circuit Court was not obtained and *exercised solely because of the parties being citizens of different States* as was the fact in *Spencer v. Silk Co.*

AUTHORITIES IN SUPPORT OF RIGHT OF APPEAL.

The right of appeal exists in the case at bar, because the plaintiff's bill of complaint as amended, constituting his pleading, sets up a ground of Federal jurisdiction other than diversity of citizenship.

In *Northern Pacific Ry. Co. v. Soderberg*, 188 U. S., 526, it was held:

"Although the jurisdiction of the United States Circuit Court be originally invoked on the ground of diverse citizenship, the attribute of finality cannot be impressed upon the judgment of the Circuit Court of Appeals unless it appear that the original jurisdiction was dependent *entirely* upon such diversity of citizenship, and where the case made by the plaintiff depends upon the proper construction of an act of Congress with the contingency of being sustained by one construction, and defeated by another, it is one arising under the laws of the United States, and this Court has jurisdiction thereof under Section 1 of the Act of 1888."

The Court said, at page 528:

"Motion was made to dismiss this appeal for the reason that, as the jurisdiction of the Cir-

cuit Court was invoked upon the ground of diverse citizenship, the decree of the Circuit Court of Appeals is final, under Section 6 of the Court of Appeals, Act of 1891, as interpreted by the decisions of this Court in *Colorado Central Mining Co. v. Turck*, 150 U. S., 138; *Borgmeyer v. Idler*, 159 U. S., 408; and *Press Publishing Co. v. Monroe*, 164 U. S., 105. But, to impress the attribute of finality upon a judgment of the Circuit Court of Appeals, it must appear that the original jurisdiction of the Circuit Court was dependent 'entirely' upon diverse citizenship. That is not the case here. Plaintiff's bill does indeed set up a diversity of citizenship as one ground of jurisdiction, but as it appears that its title rests upon a proper interpretation of the Land Grant Act of 1864 as to the exception of non-mineral lands, there is another ground wholly independent of citizenship under that clause of Section 1 of the Act of 1888, 25 Stat., 433, clothing the Circuit Court with jurisdiction of all civil suits involving over \$2,000, 'and arising under the Constitution or laws of the United States.' If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States."

In *Montana Mining Co. v. St. Louis Mining Co.*, 204 U. S., 204, it is shown that the amended complaints constitute original pleadings by the plaintiff so far as sustaining jurisdiction in the United States Courts is concerned. The Court said at pages 212 and 213:

"The first question is, of course, the one of jurisdiction. If the jurisdiction of the Circuit Court depended alone on diverse citizenship then, undoubtedly, the decision of the Court of Appeals was final, and the case could

only be brought here on certiorari. On the other hand, if it did not depend alone on diverse citizenship, the decision of the Court of Appeals was not final, and the case is properly here on a writ of error. The original complaint alleged the citizenship of the two corporations, plaintiff and defendant, but did not allege the citizenship of the individual defendants. In order to sustain the jurisdiction of the Circuit Court on the ground of diverse citizenship the citizenship of all the parties on one side must be diverse from that of those on the other. So, unless there was a Federal question presented by that complaint, as the citizenship of the individual defendants was not shown, the Circuit Court had no jurisdiction of the case. It may be that this was remedied by the subsequent first and second amended complaints, in which the individual defendants were left out, the citizenship of the two corporations, plaintiff and defendant, alleged, and to which complaints the *Montana Company*, without raising any question of jurisdiction, appeared and answered."

In *Henningsen v. U. S. Fidelity & Guaranty Co. of Baltimore*, 208 U. S., 404, it was said at page 409:

"A motion is made to dismiss on the ground that the jurisdiction of the Circuit Court was invoked solely on the ground of the diversity of citizenship of the parties, and hence the decree of the Circuit Court of Appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and relief were also based on the statutes of the United States, as from the discussion of the merits will be seen. Those statutes entered as elements into the decision of the Circuit Court of Appeals, and were necessary elements *Howard v.*

United States, 184 U. S., 676; *Warner v. Searle & Hereth Co.*, 191 U. S., 195, 205."

In *Huguley Manufacturing Co. v. Galetton Cotton Mills*, 184 U. S., 290, at page 295, the Court said:

"If the jurisdiction of the Circuit Court rests solely on the ground that the suit arises under the Constitution, laws or treaties of the United States, then the jurisdiction of this Court is exclusive, but if it is placed on diverse citizenship, and also on grounds independent of that, then if carried to the Court of Appeals, the decision of that Court would not be made final, and appeal or writ of error would lie *American Sugar Company v. New Orleans*, 181 U. S., 277."

In *Howard v. United States*, 184 U. S., 676, in a suit brought on a United States Clerk's bond, the Court said:

"But does it not appear from the petition itself that the case was one of which the Circuit Court could take cognizance independently of the citizenship of the real parties in interest? This question must receive an affirmative answer. The suit was directly upon a bond taken by the Circuit Court in conformity with the statutes of the United States, and the case depends upon the scope and effect of that bond and the meaning of those statutes. It was therefore a suit arising under the laws of the United States, of which the Circuit Court (concurrently with the Courts of the State) was entitled to take original cognizance, even if the parties had been citizens of the same State."

The foregoing cases are applicable precisely to the case at bar, because when the plaintiff filed his amended complaint basing his right to recover

upon the Federal Employers' Liability Act, he stated a case of which the Circuit Court, concurrently with the State Courts, had jurisdiction.

The test to determine whether the jurisdiction of the Federal Court is dependent solely upon diversity of citizenship is to strike from the pleadings allegations as to diversity of citizenship and then, if no other ground of Federal jurisdiction appears, the case must be dismissed. This is the decision in *Weir v. Rountree*, 216 U. S., 602. This test applied to the case at bar shows that it is one that would not have been dismissed, because the plaintiff's pleadings do disclose a Federal cause of action distinct from and additional to the ground of diversity of citizenship. So it was held in *Warner v. Searle Co.*, 191 U. S., 195, in a registered trade mark case, that:

"It is the use without right of the registered trade mark of another in foreign or Indian commerce that gives jurisdiction to the Federal Courts under the act of March 3, 1881.

"The averments of the bill in this case are treated as sufficiently asserting the use of the registered trade mark and the alleged imitation in foreign commerce to found jurisdiction in the Circuit Court under the act as well as on the diverse citizenship."

The Court said at page 205:

"In the present case, diverse citizenship, and requisite amount, existed, and the Circuit Court, therefore, had jurisdiction, but it is argued that the jurisdiction depended entirely on diversity of citizenship, and hence that the decision of the Circuit Court of Appeals was final. We think, however, that as infringement of a trade mark registered under the act was charged, the averments of the

bill, though quite defective, were sufficient to invoke the jurisdiction also on the ground that the case arose under a law of the United States, and will not, therefore, dismiss the appeal."

In the *Railroad Commission of Ohio v. Railroad Company*, 225 U. S., 101; it was held:

"Where the petition of the Receiver, appointed in a case dependent on diverse citizenship, invokes the jurisdiction of the Circuit Court not only as ancillary to the receivership, but also to protect the estate on grounds involving alleged infractions of the Federal Constitution and rights secured thereby, the case is not one in which the judgment of the Circuit Court of Appeals is made final by the Act of 1891."

The Court said at page 104:

"An examination of the bill in this case, which was filed under the authority of the Circuit Court, shows that the order of the Commission was attacked, not only upon the ground that its findings were alleged to be unsupported by the testimony and to have been made upon improper consideration of the facts, but also because the order affected and interfered with interstate commerce, in which the complainant was engaged and over which the Railroad Commission of Ohio had no authority because of the commerce clause of the Federal Constitution. It further was alleged that the owners of the property constituting the receivership estate would be deprived thereof without due process of law; that they would be denied the equal protection of the laws, and that their property would be taken without compensation. It thus appears that jurisdiction was invoked, not only because the present case is ancillary to the receivership suit, which depended upon

diverse citizenship, but upon grounds which involve alleged infractions of the Federal Constitution and rights secured thereby. The case was therefore one which might have been taken to the Circuit Court of Appeals, and the fact that it involved grounds which might have warranted a direct appeal to this Court did not deprive the Circuit Court of Appeals of jurisdiction *American Sugar Refining Co. v. New Orleans*, 181 U. S., 277; *Macfadden v. United States*, 213 U. S., 288."

In *Hull v. Burr*, 234 U. S., 712 (relied on by defendant-in-error in Defendant-in-error's Book, p. 17), it is said at page 720:

"We have not considered whether the action could be regarded as ancillary to the proceedings in bankruptcy and for that reason maintainable in the District Court as a suit arising under the laws of the United States * * * because complainants *have not planted themselves upon that ground.*"

In *Florida, etc., Railroad Company v. Bell*, 176 U. S., 321, it is held:

"As the plaintiffs in the Circuit Court claimed in their declaration that the controversy was one that turned on the construction of the laws of the United States, and as both Courts below dealt with the case on that assumption, this Court has jurisdiction to review the judgment of the Circuit Court of Appeals."

The general principle sustaining the right of appeal is thus stated in *Loveland, Appellate Jurisdiction*, Section 165, as follows:

"Whether a case involves the construction or effect of a law of the United States for the purposes of Federal jurisdiction depends upon the plaintiff's statement of his case in the

Court, State or Federal, in which it is brought. The statement of his case includes the amendments to his original pleadings."

SECOND FEDERAL QUESTION.

See "X," "XI," "XII" and "XIII" Assignments of Error, pages 378-379.

Besides the Federal question as to the application of the Federal Employers' Liability Act, there is another question which is vital to the judgment rendered below. It is properly before this Court upon the records. It should be given due consideration before deciding the motions of the defendant-in-error. And that question is:

THE QUESTION OF THE JURISDICTION OF THE TRIAL COURT.

While the plaintiff-in-error will contend strenuously that the Federal Employers' Liability Act, exclusively measures the rights and liabilities of the parties to this action and that under the application of the said act, the defendant-in-error is barred from recovering against the Railroad Company by the two years' limitation clause, it also contends (provided, this Court holds the Federal Act inapplicable) that upon the record, the Trial Court had no jurisdiction to try and determine any State or common law cause of action. Or, in other words, when the United States Circuit Court of Appeals held that the Federal Act was not applicable to the case, it should have reversed the judgment of the Trial Court and should have directed the Trial Court to remand the case to the Supreme Court of the State of New York, whence it had been removed to the Federal Court.

A cursory examination of the record shows as follows, viz.:

1. The plaintiff-in-error removed the case from the Supreme Court of the State of New York, County of Richmond, on the grounds:

(a) That the plaintiff-below was an alien, a subject of the Russian Government, residing in Richmond County, State of New York (see fol. 43); and

(b) That the defendant-below was a foreign corporation, organized and existing under the laws of the State of Pennsylvania (see fol. 44); and

(c) That a controversy in said action existed solely between a non-resident corporation and an alien (see fol. 44).

2. Upon the trial, the plaintiff-below testified that he was not an alien but that he was then and had been for a long time a citizen of the United States (see fol. 194).

From the above, it will be conceded that the jurisdiction of the United States District Court for the Eastern District of New York must fall so far as any State or common law cause of action be concerned unless a basis of jurisdiction can be found in the record other than the original one upon which the cause was removed.

The contention of counsel for the defendant-in-error in his motion brief, last paragraph on page 4, as to the question of jurisdiction, is that the record shows on its face that the plaintiff-below was a citizen of New York State and a resident

thereof *at the time this action was begun* and that, as the defendant-below was a citizen and resident of the State of Pennsylvania, therefore, the necessary diversity of citizenship existed and consequently "the District Court therefore *retained jurisdiction.*"

The contention of the plaintiff-in-error is directly opposed to that of the defendant-in-error. The plaintiff-in-error contends that the record shows conclusively that diversity of citizenship did not exist *at the time when the action was begun.*

Referring to the record, for light upon this issue, the following facts appear, viz.:

1. The defendant-below was a corporation of the State of Pennsylvania.
2. The plaintiff-below was forty-seven years old when he was injured (fol. 192).
3. The plaintiff-below was injured while employed by the defendant-below in the State of Pennsylvania (fol. 192).
4. The plaintiff-below had been employed in the mines where he was injured for a period of eighteen years (fol. 194).

From the above, it will be conceded (a), that the cause of action arose in the State of Pennsylvania and that when it arose the parties were citizens and residents of the same State; and, (b), that the District Court lacked jurisdiction unless the plaintiff below had become a citizen of the State of New York *at the time when his action was begun.*

Does the record show sufficiently to sustain the jurisdiction of the District Court, that the plaintiff below, prior to the commencement of this ac-

tion, had changed his citizenship from the State of Pennsylvania to the State of New York?

Even upon the contention of the defendant-in-error, in order to sustain the jurisdiction of the United States District Court, the record must contain evidence not only that the plaintiff had changed his citizenship from Pennsylvania, but that he had made such change in time to have become a citizen of New York State *when he began his action*. If he became a citizen of New York State *after* his action was begun, such change of citizenship did not confer jurisdiction upon the United States District Court.

Diversity of citizenship must have existed at the time suit was begun.

Gibson v. Bruce, 108 U. S., 561.

WHAT DOES THE RECORD SAY ABOUT THE CLAIMED CHANGE OF CITIZENSHIP?

(See fols. 277, 278, 279):

"Q. Did you suffer pain in the hospital?

A. Yes.

"Q. Afterwards did you come to the State of New York? A. When I could move I came here, for I thought I might make a better living.

"Q. You came here with your wife and children? A. Yes.

"Q. Do you intend to make New York your home? A. I live here in New York but my wife didn't feel very good, and she went back to Pennsylvania.

"Q. Did you go back there on one occasion to look after your witnesses? A. Yes.

"Q. You live in New York and you are a licensed peddler? A. Yes, I live here as a peddler.

"Q. *How many times* did you come over

here to New York and live here for a while and go back, *after you brought this suit?* A. Three times, once, before, alone, and I came to New York to see if I could make a better living, and afterwards I came back and stayed three weeks, and the next time I came I took my wife to New York."

Also see folios 285-286:

"Q. Did you leave the coal mine region after the accident, after you came out of the hospital? A. When I came from the hospital and got a little better afterwards I came to New York looking for a better position.

"Q. Have you been in New York ever since, excepting some trips back to the mining region? A. About a week's time.

"Q. Do you call New York your home at present? A. Yes.

"Q. Has it been your home ever since you first came here after the accident? A. I call New York my home.

"Q. (repeated): Has it been your home ever since you first came here after the accident? A. I count my *regular* home in New York *since I came the second time with my family.*"

See, also, folio 300:

"Q. How old were you when you got married? A. Forty-six.

"Q. Had you ever been married before that? A. No."

Counsel for the plaintiff-in-error has carefully examined the whole record and assures the Court that the above extracts from the record contain all the evidence therein which bears upon the question of when the defendant-in-error, if ever, changed his residence or citizenship from Pennsylvania to New York.

Giving the said evidence every consideration to which it may be entitled for any reason, it must be held fairly, as a matter of law, that the plaintiff did not change his citizenship by act or intention until he had come to New York with his family, which consisted of his wife. He states positively that he did not call his regular residence in New York until "I came the second time with my family," and that he did not come the second time with his family until *after this action had been begun*.

It also appears that his wife "didn't feel very good, and she went back to Pennsylvania."

FURTHER LIGHT ON THE QUESTION OF
CITIZENSHIP FOUND IN THE BRIEF SUB-
MITTED BY COUNSEL FOR DEFENDANT-
IN-ERROR ON THIS MOTION:

In view of the claim or statements of plaintiff below that he changed his citizenship at any time, it is interesting to read and consider the argument of his counsel on the last page of his printed argument submitted in aid of his motions (p. 18 thereof). The plaintiff below says in his testimony that he came to New York to better his position to earn a living as a peddler, but his counsel says as follows, viz: Referring to plaintiff below, "He is now unable even to take proper care of himself, to say nothing of securing employment. He is even so incapacitated that he is unable to go out and beg."

There is no allegation or claim that the condition of plaintiff has changed since he received his injuries because such claim would be contrary to the theory upon which his counsel relies in order to sustain the very large judgment (\$36,000), and

would be contrary to the evidence in the record (see fol. 164).

"Q. So far as his health and organs, etc., are concerned and his probable life—so far as his heart and lungs and kidneys are concerned, as to his probable life what did you find?

"A. I found him a perfectly normal man; his heart is normal and his pulse is regular, good and strong; he says his appetite is good and he sleeps well. His heart action is very regular. So far as his health is concerned there is nothing that I observed to prevent him from living to an ordinary ripe old age."

From all the foregoing, the evidence, together with the statements of counsel, shows as follows:

(a) That the plaintiff-below never had any business to New York State excepting the bringing of this action there;

(b) That he never called New York his home until after his action was begun;

(c) That his obtaining a license there to peddle was at the suggestion of counsel and for the purpose of justifying the importation of this litigation from Pennsylvania to New York State where his attorney was engaged in practice;

(d) That his family was taken to New York after the action was begun but soon returned to Pennsylvania where its members still reside;

(e) That in the nature of things, a man in the physical condition of the plaintiff-below needs the care and comforts of his wife and old friends and will not live apart from them

excepting for temporary advantages and never leaves them, but with the intention to return as soon as convenient; that he never intended to acquire a residence in New York State;

(f) That his intention to reside in New York State lacked the element of "permanency" which the law requires in order to have a change of residence or citizenship accomplished.

Hislop v. Taffe, 141 App. Div., 40.

Firth v. Firth, 50 N. J. Eq., 137.

Penfield v. C., O. & S. R. R. Co., 134 U. S., 351.

Therefore, the question of jurisdiction is a vital one and it is raised in good faith and rests upon the record in such a substantial manner that the motion to dismiss should be denied. The question is worthy of the attention of a full bench after brief and argument in the usual and regular way.

Where the jurisdiction fails, the objection can be raised in this Court; if not by the parties, then by the Court itself.

Fernandez Y. Perez v. Perez Y. Fernandez, 202 U. S., 80.

Parker v. Ormsby, 141 U. S., 81.

Mansfield, C. & L. M. R. R. Co., v. Swan, 111 U. S., 379.

Thompson v. Cent. Ohio R. R. Co., 6 Wall., 134.

SECOND POINT.

The judgment below should not be affirmed on motion. It is manifest that the writ of error was sued out in good faith and that the grounds asserted in support of it are not frivolous. The questions raised are serious, important and far-reaching. They are worthy of the best efforts of counsel and the closest consideration of the Court.

In support of this point, it seems almost unnecessary to present any argument or to cite any precedents other than what is already accomplished under the First Point. But the plaintiff-in-error stands before the Court on this motion charged by the opposing counsel with bad faith. He alleges that the writ of error rests upon frivolous grounds and was taken for delay only:

First. This cause of action arose on July 6, 1911 (fol. 192); that plaintiff-below remained in the hospital ten months, or until about May 6, 1912 (fol. 276); but that he did not begin his action until May 7, 1913 (fol. 150), about one year of delay is thus due to the plaintiff-below;

Second. Issue was joined by the filing of the answer on May 27, 1913, and in October, 1913, the case duly appeared upon the day calendar of the District Court for trial. The attorney for the plaintiff-below obtained a continuance for the purpose of moving formally for permission to serve an amended complaint. The motion was made and granted, but the trial of the action was thereby delayed until March 30, 1914 (see fol. 155). This delay of six months was due to the conduct of the attorney for the plaintiff-below.

Third. The original judgment was entered on May 13, 1914 (fol. 148); was reviewed by the United States Circuit Court of Appeals; and the case was docketed in this Court on March 2, 1915, or in about nine and one-half months from the entry of the judgment in the District Court.

From the above it will be noted that whatever delay has been, was not caused by the defendant-below.

THIRD POINT.

While the plaintiff-in-error desires a quick determination of the questions raised by the assignment of errors, it protests earnestly against any action by way of the summary docket and an immediate hearing.

Counsel for the defendant-below desire a reasonable opportunity and sufficient time to prepare brief and argument in this case. In the interests of their client, it seems entirely proper to call this Court's attention to certain prominent features which are of this case and which, it is believed, will interest the Court and which will be held by the Court to justify its interest and careful consideration.

First. The serious injuries of the plaintiff-below, in the very nature of things, begets sympathy to a degree that makes it difficult for the defendant Railroad Company to obtain a fair and impartial hearing anywhere upon the merits of the case.

Second. The great prejudice existing almost universally against these anthracite coal producers who have been charged with violations of the law in unlawfully seeking to obtain a monopoly of a com-

modity necessary to the consumer, also, in the nature of things, tends to defeat a just consideration of the rights of the defendant-below. Almost all Judges and jurymen are consumers of anthracite coal.

Third. It seems reasonable to contend that the jury's verdict of \$50,000.00 was a direct result of the combination of excessive sympathy for the plaintiff-below with excessive prejudice against the defendant-below. The Trial Court enforced a reduction of \$14,000.00, but permitted the entry of a judgment for \$36,000.00 as fairly representing the damages when the record showed that the plaintiff-below was not injured by the negligence of the defendant-below; that at the time of the injury, the plaintiff-below was forty-seven years of age; that his previous earnings averaged \$900.00 per year; and in spite of the fact that he had been an unmarried man up to within one year of the accident, that he had saved nothing from his wages.

Fourth. On the face of the record, there is substantial merit in the contention of the defendant-below, that the judgment of \$36,000.00 is so excessive that it should be held as a matter of law to be a result of an unintentional conspiracy upon the part of the jury and the Trial Court to compel the defendant-below to compensate the plaintiff-below regardless of the merits of the case, and because of sympathy and prejudice.

Fifth. The amount of the judgment *per se* relieves the plaintiff-in-error from the charge that the writ of error was taken for delay or upon frivolous grounds.

Sixth. The plaintiff-below although alleged to

be without resources, has had a numerous counsel. An enumeration of them is interesting:

(1) Attorney Charles Goldzier, of No. 115 Broadway, New York City, brought the original action in New York Supreme Court (fol. 34).

(2) Attorney Baltrus S. Yankaus, 154 Nassau Street, New York City, served the amended complaint in the United States District Court (fol. 105).

(3) Attorney Thomas O'Neill tried the case (fols. 155, etc.).

(4) Attorney John V. Bouvier briefed and argued the case before the United States Circuit Court of Appeals and assisted in the preparation of the brief on this motion.

(5) Attorney William Montague Geer, Jr., is now one of the counsel on this motion brief.

(6) Attorney George C. Holt appears as chief counsel upon this motion.

If this writ of error was taken for delay and upon frivolous grounds, why this array of counsel?

It seems that the questions raised by the assignments of error are serious and of substantial merit, entirely different from those usually placed upon the summary docket for an immediate hearing.

FOURTH POINT.

Under the limitations imposed by this Court upon its review of the record in relation to the questions of negligence and contributory negligence, it will be found that the defendant-in-error failed to show that his injuries were due to the negligence of his employer.

HISTORY OF THE CASE.

At the time of the accident Yurkonis was about forty-seven years of age (fol. 192), and he had been employed in the mine where he was injured for eighteen years (fol. 194), and during that period he had been a certified miner (fol. 284). On the morning of July 6, 1911, he went to work at half-past six o'clock (fol. 291) in the Pettibone Colliery, and worked getting out coal by drilling and blasting. He had drilled and fired four holes by noontime (fol. 262), and in the afternoon had finished drilling and loading a fifth hole (fol. 263). When he had succeeded in lighting the squib or fuse leading to the powder with which he had loaded this hole, and was replacing his caplight on his head (fols. 270-273), the blast went off and caused his injuries.

Although the plaintiff-below contended that the powder blast was set off by a gas explosion, he testified, to avoid the charge of contributory negligence, that just before he lighted the fuse to explode the blast, he tested his working place to see whether any gas was present or not. He made this test as it is always customary with miners exercising due care. He swears that he made the test but there was no gas present. Yet, he contends that there

was an immediate gas explosion set off by his miner's lamp. See plaintiff's own testimony, as follows, viz.:

"Before I started to light the touch paper on my open lamp, I took my safety lamp from my belt and looked to see if there was any gas. I held it up along the face. There was no gas at that time (fol. 271). When there is gas the safety lamp shows it by making a blue light. When I finally succeeded in lighting the end of the squib which takes about 2 minutes to burn, I started to walk out and walked to the open lamp and went to put it on my head, and it lit up the gas and knocked me down; afterwards I thought it had gone out; I started to get up, and when I began to raise myself the gas knocked me down again on the side. At that time I was facing the blast; and the second time I fell down the blast came. I was knocked down by the gas twice before the blast came, I was on my back with my face up, the second time when I fell down on this side my face was right towards the shot" (fols. 272-273).

"If a squib is lit by gas it can be lit at any point of the part which remains beyond the powder. I lit this particular squib on the end, and if it had not been for the gas lighting and knocking me down, I would have gotten out of this crosscut in safety. I had plenty of time to get out; there was lots of time, after I had lighted, to get out" (fols. 274-275).

"This burn on top of the head that the doctor testified to, I got that burn at the time of the accident. From that time I don't remember nothing, I was very much injured" (fol. 276).

The Court will also note the testimony that there were two explosions which is a physical absurdity.

The necessity of the plaintiff:

1. To show due care upon his part; and
2. To show the dangerous accumulation of gas in his working place because of insufficient ventilation,

were paradoxical and resulted in his own defeat, necessarily.

The Court will also note that the ventilation had been good all day, at least up to the time in the afternoon when the accident occurred and therefore that the employer's facilities were sufficient.

THE EARMARKS OF FRAUD.

1. The long delay by Yurkonis in bringing his action. He was out of the hospital in May, 1912, and entirely recovered so far as his general health was concerned. He began his action on May 7, 1913.

2. The case was imported from the State of Pennsylvania, where it arose, and where both parties with their witnesses resided, into the State of New York.

3. Although Yurkonis came to Manhattan, New York City, to peddle lead pencils, he brought his action in Richmond County, Staten Island, in the Supreme Court of the State of New York.

4. Having been injured directly by the explosion of a blast which he alone had prepared and with squibs which he alone had cared for, he could attempt a recovery against his employer in but one way, viz., by showing a failure to ventilate.

5. But in showing a failure to ventilate, he must also free himself from contributory negligence by

proving that he loaded the hole and fired the squib pursuant to the Anthracite Mining Law, and pursuant to the universal custom of testing for gas with his test lamp before lighting the squib.

6. The predicament of testing for gas and finding none and then having an almost immediate explosion of gas.

7. The necessity of having a gas explosion to make out a case.

8. Necessity is always the mother of invention.

FIFTH POINT.

The motions of defendant-in-error should all be denied.

Respectfully submitted,

F. W. THOMSON,

W. S. JENNEY,

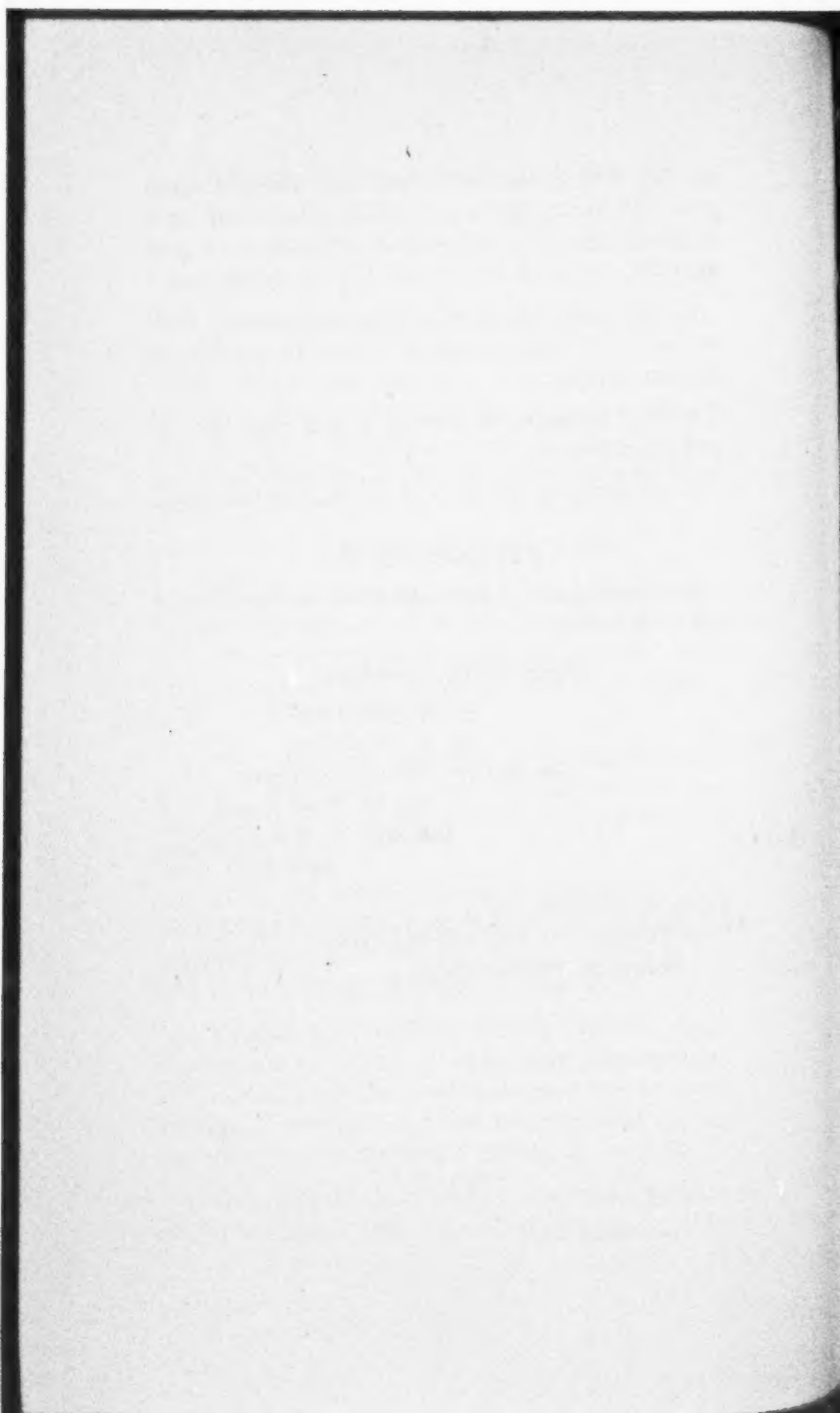
Counsel for Plaintiff-in-Error,

No. 90 West Street,
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EVERETT WARREN, Esq.,

Of Counsel for Plaintiff-in-Error,

Scranton, Pennsylvania.



Office Supreme Court, U. S.

FILED

MAY 1 1915

JAMES D. MAHER

CLERK

UNITED STATES SUPREME COURT.

THE DELAWARE, LACKAWANNA
& WESTERN RAILROAD COM-
PANY,

Plaintiff-in-Error,

vs.

MATT YURKONIS,

Defendant-in-Error.

No. 852.

NOTICE OF MOTION TO DISMISS OR AFFIRM AND ARGUMENT FOR DEFENDANT-IN-ERROR.

GEO. C. HOLT,
Counsel for Defendant-in-Error,
233 Broadway,
New York.



UNITED STATES SUPREME COURT.

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Plaintiff-in-Error,

v.

MATT YURKONIS,
Defendant-in-Error.

Now comes Matt Yurkonis, the defendant-in-error, by George C. Holt, his counsel, and moves this Court to dismiss and quash the paper purporting to be a writ of error herein for want of jurisdiction on the ground that the judgment of the Circuit Court of Appeals was final and cannot be reviewed by writ of error, and on all the grounds stated in the accompanying brief of argument.

And the said defendant-in-error by counsel as aforesaid also moves this Court to affirm the judgment below on the ground that it is manifest that the paper purporting to be a writ of error herein was taken for delay only and that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

And the defendant-in-error by counsel as aforesaid also moves this Court that if neither of the aforesaid motions be granted to have the above entitled case transferred for hearing to a summary docket under Rule 6 of this Court.

GEO. C. HOLT,
Counsel for Defendant-in-Error.

THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

JOHN BURNET

OF

THE UNIVERSITY OF OXFORD

IN TWO VOLUMES

THE first of these two volumes contains the history of the reign of Charles the first, from the year 1625 to the year 1649. The second volume contains the history of the reign of Charles the second, from the year 1660 to the year 1685. The first volume is divided into two parts, the first part containing the history of the reign of Charles the first, and the second part containing the history of the reign of Charles the second. The second volume is divided into two parts, the first part containing the history of the reign of Charles the second, and the second part containing the history of the reign of Charles the first.

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THE HISTORY OF THE REIGN OF CHARLES THE FIRST

UNITED STATES SUPREME COURT.

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Plaintiff-in-Error,

v.

MATT YURKONIS,
Defendant-in-Error.

Please take notice, that on Monday, May 3d, 1915, at the opening of the sitting of this Court to be held at the Capitol in Washington on that day, or as soon thereafter as counsel can be heard, on the record in this case filed in this Court and docketed on or about March 2, 1915, as No. 852, October Term, 1914, a motion will be made, pursuant to the provisions of Rule 6 of this Court, to dismiss the writ of error in this case on the ground that the judgment of the Circuit Court of Appeals was final and cannot be reviewed by writ of error, and on all the grounds stated in the accompanying brief of argument; or, if such motion is not granted, to affirm the judgment below on the ground that it is manifest that the writ was taken for delay only, or that the questions on which the decision of the cause depends are so frivolous as not to need further argument; or, if neither of said motions be

granted, that the cause be ordered transfered for hearing to a summary docket; and for such other relief as may be just.

Dated April 9, 1915.

GEO. C. HOLT,
Counsel for Defendant-in-Error,
233 Broadway,
New York.

To

William S. Jenney, Esq.,
Counsel for Plaintiff-in-Error,
90 West Street,
New York City.

UNITED STATES SUPREME COURT.

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Plaintiff-in-Error,

against

MATT YURKONIS,
Defendant-in-Error.

**Brief for Defendant-in-Error on Motion to
Dismiss Writ of Error or Affirm the
Judgment, &c.**

This is a motion to dismiss the writ of error, or affirm the judgment, or, if such motion is denied, to have the cause transferred for hearing to a summary docket under Rule 6 of this Court.

The action was brought by a miner employed by defendant to recover damages for personal injuries sustained by reason of the premature explosion of a blast which was precipitated by an explosion of gas due to defective ventilation of the defendant's coal mine. Although there were other specifications of negligence, the theory of liability, which was submitted to and decided by the jury, was that the defendant had failed to furnish the plaintiff with a safe place to work, and had negligently failed to comply with the requirements of the Anthracite Mining Laws of Pennsylvania, which were designed for the protection of miners.

The jury brought in a verdict of \$50,000 for the plaintiff, which the Trial Court reduced to \$36,000 (fol. 133), but refused to set aside (fol. 139).

The case was reviewed upon a writ of error by

the Circuit Court of Appeals for the Second Circuit, and was affirmed (p. 371), the opinion being written by Judge Ward (p. 367).

The important incidents of this action may be stated in chronological order as follows:

The plaintiff was injured by an explosion in the defendant's mine on July 6th, 1911 (fol. 73).

On May 7th, 1913, he brought this action in the New York Supreme Court for the County of Richmond.

The complaint set forth the facts that the plaintiff was at the time engaged in blasting coal from the ground, etc., and stated a cause of action at common law and under the Pennsylvania statutes, quoting both the Pennsylvania Employers' Liability Act and the Pennsylvania Mining Law. No cause of action under the Federal Employers' Liability Act was even suggested (fol. 9).

On May 23rd, 1913, the defendant filed a petition for the removal of said cause of action into the District Court of the United States for the Eastern District of New York (fol. 40). The only ground for removal alleged in the petition was that Yurkonis, the plaintiff, was an alien, residing in the County of Richmond, New York, and that the defendant was a corporation organized under the laws of Pennsylvania.

It developed, however, upon the trial and appears in the record, that the plaintiff, although born abroad in Lithuania, was a citizen of the United States (fol. 194), residing in New York (fols. 285 to 286), while the defendant was a Pennsylvania corporation (fol. 194). The necessary diversity of citizenship therefore existed, and the District Court therefore retained jurisdiction (*Sun Printing, etc., Co. v. Edwards*, 194 U. S., 377; *Rail-*

way *Co. v. Ramsey*, 22 Wall, 326; *Briggs v. Sperry*, 95 U. S., 403; *Robertson v. Lease*, 97 U. S., 646; *Steigleder v. McQuesten*, 198 U. S., 141).

The defendant filed an answer (fol. 52) in the District Court, alleging various defenses, none of which, however, raised any Federal question or indicated that the controversy arose under the Constitution or Laws of the United States.

On October 15th, 1913, five months after the case had been removed, an amended complaint (fol. 71) was served by the permission of the Court. The amended complaint followed the original complaint and set forth a cause of action at common law and under the Pennsylvania statutes. It contained, however, additional Paragraphs III and V (fol. 72), which alleged in general that the parties were engaged in interstate commerce. The actual facts, however, which were pleaded made no stronger case for the application of the Federal Act than the original complaint.

Paragraph VI of the amended complaint showed that the plaintiff was engaged in the blasting of coal when he was injured by the premature explosion of a charge of dynamite which was used in the process of blasting. The allegations in Paragraphs III and V to the effect that the plaintiff was engaged in interstate commerce were thus contradicted and destroyed by the statement of facts which showed that the plaintiff was not engaged when injured in interstate commerce. For whatever purposes the coal might be used afterwards, the operation of blasting it from the ground was not an act of interstate commerce.

No merchandise is a subject of interstate commerce until its transportation between the States has commenced.

Coe v. Errol, 116 U. S., 517.

The Daniel Ball, 10 Wall, 565.

Illinois Central R. Co. v. Behrens, 233 U. S., 478.

Bay v. Merrill, etc., Co., 211 Fed., 717.

Norgard v. Marysville, etc., Co., 211 Fed., 721.

Shanks v. Delaware, etc., Co., N. Y. Court of Appeals, March 26, 1915, reported in N. Y. Law Journal, April 7, 1915.

Such was the holding of the Circuit Court of Appeals, which said in the opinion:

"We think it is quite clear that the mere act of mining coal is not interstate commerce, and no concession by the defendant can give the Court jurisdiction on that ground" (p. 370).

The defendant, also, by its sworn answer to the amended complaint, denied the allegations contained in Paragraphs III, IV and V (fol. 110), and thereby denied that the parties were engaged in interstate commerce.

The case came to trial and was tried solely upon the theory that the defendant had been guilty of negligence at common law, and under the provisions of the Pennsylvania statutes, in respect of the conditions existing in its mine and the protection afforded the plaintiff. No evidence, whatsoever, had been given up to the time when the plaintiff rested his case, which tended in any way to show that the parties were engaged in interstate commerce. On the contrary, the evidence showed that the plaintiff was engaged in blasting coal, which, as we have seen, can under no circumstances be an act performed in interstate commerce. A motion was then made by the defendant to dismiss the complaint on

ten distinct grounds, no one of which involved any Federal question (fols. 336-340). The reasons urged for dismissal related merely to the question of the defendant's negligence and the plaintiff's contributory negligence.

Even during the introduction of the defendant's case no evidence was given which tended to show that the parties were engaged in interstate commerce. A colloquy, however, occurred between counsel and witness which bore upon the question of interstate commerce, but which, instead of establishing a situation involving interstate commerce, showed the opposite. The defendant's witness, Henry G. Davis, was being cross examined, and his testimony and the proceedings in connection with it appear in the record as follows:

"Q. The coal, of course, which was mined there was not only transported and sold to dealers, but also the locomotives of the Delaware, Lackawana & Western would come along to this colliery and coal up? A. Yes.

"Q. And then these locomotives, of course, would go out upon the railroad and carry the freight and the passengers of the company? A. I can't answer that question.

"Q. Well, that was the design; they weren't coaled up for nothing? A. I presume that was the design; but then I don't know as to that.

"Q. You have seen them coal up, haven't you? You have seen the big express locomotives coaling up there? A. No, sir, never.

"Q. You have seen locomotives coaling up there, haven't you? A. No, sir, it is not a coaling station.

"Q. All the coal is transported to the defendant's coaling station, is it? A. I do not know what disposition is made of the coal. We place it in railroad cars" (fols. 415-417).

"Mr. Thomsen: At this time the defendant

concedes that it mines the coal which it uses in its locomotives in Interstate Commerce and that as a matter of fact and a matter of law the coal which Mr. Yurkonis was mining was used in that way, and that we were engaged in Interstate Commerce.

"Mr. O'Neill: This particular coal was not for the market?

"Mr. Thomsen: No, we were both engaged in the Interstate Commerce at the time the injury occurred.

"The Court: That is, the Railroad Company was engaged in business that would be Interstate Commerce and was getting its coal for its own purpose?

"Mr. O'Neill: Yes."

Assuming that the coaling of defendant's locomotives with the product of this mine would have been a service in interstate commerce, it affirmatively appears from the testimony just quoted that this was not a coaling station; that the locomotives did not coal up there; but that the coal, after its removal from the mine, was placed on railroad cars and then transported and sold to dealers.

At no time during the trial did the defendant urge any rights under the Federal Act, or object to evidence which was material only to the causes of action at common law and under the State statutes; nor did it move to amend its answer so as to withdraw its denial that the parties were engaged in interstate commerce, or so as to set that up as a special defense. It made no motion at any time to strike out the plaintiff's proof of the State laws; it made no objection to the plaintiff's examination of its witness in the light and upon the subject of the Pennsylvania Laws. Its counsel at the close of the entire case even himself introduced in evidence certain portions of the Pennsylvania Mining

Laws (fol. 817). It made no offer to prove that the parties were engaged in interstate commerce, or that it was misled or surprised by the proof of a cause of action at common law.

At the close of the entire case, after having kept its own counsel as to what it intended to do, the defendant moved for the direction of a verdict upon the ground that the evidence had established that the Federal Employers' Liability Act applied and was exclusive of all other remedies; and that as the amended complaint had been served more than two years after the injuries occurred, although the action was originally brought in time, the two years' limitation clause in the Federal Act operated to bar a recovery (fols. 835-838).

Plaintiff's counsel thereupon immediately moved to amend the amended complaint by striking out the allegations therein relating to interstate commerce, for the reason, presumably, that the evidence showed that the parties were not engaged in interstate commerce (fol. 862). The Court denied the motion, to which denial the plaintiff excepted (fol. 865). The Circuit Court of Appeals held that this motion should have been granted (p. 370). The Trial Court denied the motion to strike out because such relief was in its opinion useless, for the reason that if the Federal Act did apply and a recovery under it was barred by virtue of the limitation of two years, still the issues under the State laws could be submitted to the jury.

The Circuit Court of Appeals held that the Federal Act never did apply, saying:

"The Court denied this motion on the ground that it was unnecessary because the plaintiff

could recover either under the law of master and servant at common law or under the Pennsylvania Employers' Liability Act, as the evidence permitted, the Federal Act, by virtue of the limitation of two years, having ceased to apply. We think this was a right conclusion for a wrong reason. The plaintiff had a right to recover otherwise if he could, not because the Federal Act had ceased to apply, but because it never did apply. When it does apply it is the supreme law of the land and supercedes all other remedies, *Second Employers' Liability Cases*, 223 U. S., 1; *Wabash R. R. v. Hayes*, 234 U. S., 86, 89. We think it is quite clear that the mere act of mining coal is not interstate commerce and no concession by the defendant can give the Court jurisdiction on that ground. However, if it could, the plaintiff's motion to strike the allegation out should have been granted. Even a stipulation entered into inadvertently in the course of a trial will be relieved against if the opposite party is not prejudiced. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S., 403, 414; *Barry v. Mutual Life Insurance Co.*, 53 N. Y., 536."

After the affirmance of the judgment below by the Circuit Court of Appeals, the defendant secured a writ of error from this Court. This motion is made to dismiss the writ of error, or to affirm the judgment, or, if such motions are denied, to transfer the cause for hearing to a summary docket pursuant to Rule 6 of this Court.

FIRST POINT.

The judgment of the Circuit Court of Appeals is final and cannot be reviewed upon a writ of error, but only by certiorari. The writ of error should be dismissed.

The only cases in which a judgment of a Circuit Court of Appeals can be reviewed by a writ of error are those cases in which, by Section 128 of the Judicial Code, Act of March 3, 1911, the decision of that Court is not made final. That section provides that the judgment of the Circuit Court of Appeals

“shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States * * *.”

In determining upon what the jurisdiction of the District Court depended in this case, we turn to Section 24 of the Judicial Code, which specifies the questions over which the Federal Courts have jurisdiction. That section reads as follows:

“The District Court shall have original jurisdiction as follows:

“First * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under this authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens or subjects * * *.”

Of these grounds of jurisdiction, the only one relied upon in removing the case to the District

Court was that pertaining to the citizenship of the parties. The case was removed upon the ground that the plaintiff was an alien and the defendant a citizen of the United States, and jurisdiction was retained when it appeared upon the trial that the plaintiff was a citizen of the United States, resident in the State of New York, and the defendant a Pennsylvania corporation.

If the plaintiff asserts jurisdiction on the ground that the case is one arising under the laws of the United States and also upon the ground of diversity of citizenship, and he fails to state or prove a case involving a Federal question, the decision of the Circuit Court of Appeals is final, and can only be reviewed on certiorari.

Bankers, &c., Co. v. Minneapolis, &c., R. Co., 192 U. S., 371.

Pope v. Louisville, &c., Co., 173 U. S., 573.

Press Publishing Co. v. Monroe, 164 U. S., 105.

Loveland's Appellate Jurisdiction, 275.

Where the jurisdiction of the United States Court is originally invoked as here upon the ground of diversity of citizenship, "it will not be held to rest also on the ground that the suit arose under the Constitution of the United States, unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form such as is required in good pleading."

Empire State Mining, etc., Co. v. Hanley, 198 U. S., 292.

Arbuckle v. Blackburn, 191 U. S., 405.

In the case at bar, the defendant, in its amended answer, which was served five months after the District Court took jurisdiction, pleaded a defense of unconstitutionality of the Pennsylvania statutes (fol. 116). It, however, did not follow up or attempt in any way to establish that defense upon the trial; nor did it upon any of its motions to dismiss urge the unconstitutionality of any statute. If the Court will examine the defendant's assignments of error (fol. 1043), it will find that no claim there is made that any statute was contrary to the Constitution. Such being the case, it is clear that no question under the Constitution was involved or operated to give jurisdiction to the United States Court, or can be considered upon this writ of error. The United States Court did have jurisdiction, but had it upon the ground that the parties were citizens of different States (fol. 194).

The defendant will urge that the jurisdiction resulted from the fact that the construction of the Federal Employers' Liability Act was concerned. The sole ground of such a contention is the so-called stipulation or concession made, not by the plaintiff, but by the defendant, to the effect that the parties were engaged in interstate commerce. As has been seen, and as was decided by the Circuit Court of Appeals, the parties were not engaged in interstate commerce, and the alleged stipulation did not make them so. It is a case where the Federal Act did not apply, and unless the parties had been of diverse citizenship the Federal Court would have been under an obligation to remand the case to the State Court.

In *Minnesota v. Northern Securities Co.*, 194 U. S., 48, the Court said:

"It will be perceived that the plaintiff relied

on principles of general law applicable to negligence, and to the liability of defendant if there was negligence, and nowhere asserted a right which might be defeated or substantiated by one or another construction of the Constitution or of any law of the United States."

And further on in the opinion:

"We repeat that the rule is settled that a case does not arise under the Constitution or laws of the United States, unless it appears from plaintiff's own statement, in the outset, that some title, right, privilege * * * on which recovery depends will be defeated by one construction of the Constitution or laws of the United States, or sustained by the opposite construction."

If the ground of jurisdiction in the suit as originally begun is one in respect to which the decision of the Circuit Court of Appeals is final, even the fact that some Federal question is subsequently brought into the case, does not make it reviewable here by a writ of error. It can only be reviewed by certiorari.

Colorado, &c., Co. v. Turck, 150 U. S., 138.

Ex parte Jones, 164 U. S., 691.

Third Street Co. v. Lewis, 173 U. S., 457.

In *Colorado, &c., Co. v. Turck*, 150 U. S., 138, it is held:

"The jurisdiction of the Circuit Court was invoked, December 2, 1885, by the filing of the complaint from which it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it does not appear therefrom that jurisdiction was vested, or could be asserted, on any other ground. The Federal question

now suggested did not emerge until the defendant set up his second defense."

"The jurisdiction had, however, already attached and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred."

Writ of error dismissed.

In *Ex parte Jones*, 164 U. S., 691, it is said:

"Even if another ground was developed in the course of the proceedings, the judgment of the Court of Appeals would be final if the jurisdiction of the Circuit Court were originally invoked solely upon the ground of citizenship." (Citing cases.)

In *Third Street Co. v. Lewis*, 173 U. S., 457, it is said:

"When jurisdiction originally depends on diverse citizenship the decree of the Circuit Court of Appeals is final, although another ground of jurisdiction may be developed in the course of the proceedings."

In *Western Union Tel. Co. v. Ann Arbor Railroad Co.*, 178 U. S., 239, the case had been removed to the United States Court upon the ground that it arose "under the Constitution and laws of the United States."

Said the Court:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws.

"As we have said, it was not asserted in argu-

ment that the Telegraph Company had the right, independently of the contract, to maintain its line in the Railroad Company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction."

In *Spencer v. Duplan Silk Co.*, 191 U. S., 526, the Court, quoting the opinion in *Press Publishing Co. v. Monroe*, 164 U. S., 105, said, at page 530:

"The plaintiff, in her complaint, did not claim any right under the Constitution and Laws of the United States, or in any way mention or refer to the Constitution or to those laws; and, at the trial, she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who invoked the Constitution and laws of the United States. This, as necessarily follows from the foregoing considerations, and as was expressly adjudged in *Colorado Co. v. Turck*, above cited, is insufficient to support the jurisdiction of this Court to review, by appeal or writ of error, the judgment of the Circuit Court of Appeals. The jurisdiction of the Circuit Court having been obtained, and exercised solely because of the parties being citizens of different States, the judgment of the Circuit Court of Appeals was final, and the writ of error must be dismissed for want of jurisdiction."

It will not be denied in this case that the jurisdiction of the United States District Court was originally invoked solely upon a ground relating to the citizenship of the parties. If it should be held that a Federal issue entered the case, the raising of that issue by an amended complaint did not occur until five months after jurisdiction had

attached. Under the authority of the foregoing cases, such subsequent development does not make the jurisdiction of the Court dependent upon the construction of a United States law in such a way as to warrant this writ of error.

Waiving, however, the objection as to the time of the introduction of the alleged Federal issue, and assuming that it was originally in the case, we still submit that the writ should be dismissed. The parties were not engaged in interstate commerce; the Federal Employers' Liability Act did not apply, and its construction or application is in no way involved. As the Federal question asserted to be contained in the record is manifestly lacking all color of merit, the writ of error should be dismissed.

Wabash Co. v. Flannigan, 192 U. S., 29.

East Tennessee Co. v. Frazier, 139 U. S., 238.

Hull v. Burr, 234 U. S., 720.

SECOND POINT.

If the motion to dismiss the writ is not granted, the judgment below should be affirmed, on the ground that it is manifest that the writ was taken for delay only, and that the grounds asserted in support of it are frivolous.

In support of this point, it is necessary merely to refer to the cases cited and arguments presented under our First Point.

THIRD POINT.

If neither of these motions is granted, we ask that the case be ordered to be placed upon the summary docket for an immediate hearing.

It is submitted that this writ of error was probably secured by the defendant solely for the purposes of delay. The advantage of delay from its point of view is substantial and apparent. The plaintiff, as the record discloses, was frightfully and permanently injured by the defendant's negligence. Plaintiff was made blind in both eyes; his hands and legs were so crippled that he is now unable even to take proper care of himself, to say nothing of securing employment. He is even so incapacitated that he is unable to go out and beg. He requires constant attention and attendance, and has no money or means of support. Delay would either make it impossible for him to live, or compel him through necessity to accept an amount from the defendant in satisfaction of his injuries much less than he is entitled to by the verdict of the jury. Under the circumstances, the interests of justice demand a summary affirmance of this judgment.

If the motion is granted, we ask that the Court impose upon the plaintiff-in-error the ten per cent. penalty provided for by Rule 23, with costs.

Respectfully submitted,

GEORGE C. HOLT,

JOHN VERNOR BOUVIER, Jr.,

WM. MONTAGUE GEER, Jr.,

Counsel for Defendant-in-Error.

**DELAWARE, LACKAWANNA & WESTERN RAIL-
ROAD COMPANY v. YURKONIS.**

**ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.**

No. 852. Submitted May 3, 1915.—Decided June 21, 1915.

Plaintiff sued railroad company for personal injuries in the state court and defendant removed the case to the Federal court on ground of diverse citizenship; more than two years after the cause of action arose plaintiff amended his complaint setting up that he was engaged in mining coal to be sent out of the State and that he could recover under the Federal Employers' Liability Act; on the trial defendant moved to dismiss on the ground that under that act the two year statute applied and plaintiff thereupon moved to amend by striking out allegations as to interstate commerce which the court denied and the case was submitted to the jury on the issues joined under the common law and the state statute. There was a verdict for the

plaintiff, and the judgment was affirmed by the Circuit Court of Appeals. On writ of error from this court to review the judgment held that:

In order for this court to review the judgment of the Circuit Court of Appeals, jurisdiction in the District Court must have rested, not on diverse citizenship alone, but must also in part have arisen because of averments in the complaint showing a cause of action under the Constitution or laws of the United States involving a substantial controversy.

In the absence of such averments in the complaint the judgment of the Circuit Court of Appeals is final.

The fact that coal may be used in interstate commerce after being mined and transported does not make an injury sustained by the miner an injury sustained while engaged in interstate commerce, or create a cause of action under the Federal Employers' Liability Act.

Where this court cannot review the judgment of the Circuit Court of Appeals because the jurisdiction of the Federal court rests on diverse citizenship alone, it cannot pass on other questions, such as whether the plaintiff had not prior to commencement of the action removed to, and become a citizen of, defendant's State.

Writ of error to review 220 Fed. Rep. 429, dismissed.

THE facts, which involve the jurisdiction of this court to review the judgments of the state court under § 237, Judicial Code, are stated in the opinion.

Mr. George C. Holt, Mr. John Vernon Bouvier, Jr., and Mr. Wm. Montague Geer, Jr., for defendant in error in support of the motion.

Mr. William S. Jenney, Mr. Everett Warren and Mr. F. W. Thomson for plaintiff in error in opposition to the motion:

The writ of error should not be dismissed.

The judgment below should not be affirmed on motion. The writ of error was sued out in good faith and the grounds asserted in support of it are not frivolous. The questions raised are serious, important and far-reaching.

They are worthy of the best efforts of counsel and the closest consideration of the court.

While plaintiff in error desires a quick determination of the questions raised by the assignment of errors, it protests earnestly against any action by way of the summary docket and an immediate hearing.

Under the limitations imposed by this court upon its review of the record in relation to the questions of negligence and contributory negligence, it will be found that the defendant in error failed to show that his injuries were due to the negligence of his employer.

In support of these contentions see *Arbuckle v. Blackburn*, 191 U. S. 405; *Atch., T. & S. F. Ry. v. Robinson*, 233 U. S. 173; *Bankers Co. v. Minneapolis &c. R. R.*, 192 U. S. 371; *Colorado &c. Co. v. Turck*, 150 U. S. 138; *Empire Mining Co. v. Hanley*, 198 U. S. 292; *Ex parte Jones*, 164 U. S. 691; *Firth v. Firth*, 50 N. J. Eq. 137; *Florida &c. R. R. v. Bell*, 176 U. S. 321; *Gibson v. Bruce*, 108 U. S. 561; *Henningsen v. U. S. Fidelity Co.*, 208 U. S. 404; *Hislop v. Taffe*, 141 App. Div. 40; *Hoes v. N. Y., N. H. & H. R. R.*, 173 N. Y. 435; *Howard v. United States*, 184 U. S. 676; *Huguley Mfg. Co. v. Galleton Cotton Mills*, 184 U. S. 290; *Hull v. Burr*, 234 U. S. 712; *Mansfield, C. & L. M. R. R. v. Swan*, 111 U. S. 379; *Missouri, K. & T. R. R. v. Wulf*, 226 U. S. 570; *Montana Mining Co. v. St. Louis Mining Co.*, 204 U. S. 204; *Nor. Pac. R. R. v. Soderberg*, 188 U. S. 526; *Parker v. Ormsby*, 141 U. S. 81; *Penfield v. C., O. & S. R. R.*, 134 U. S. 351; *Perez v. Fernandez*, 202 U. S. 80; *Pope v. Louisville &c. Co.*, 173 U. S. 573; *Press Publishing Co. v. Monroe*, 164 U. S. 105; *Railroad Commission of Ohio v. Railroad Co.*, 225 U. S. 101; *Seaboard Air Line v. Horton*, 233 U. S. 492; *Spencer v. Silk*, 91 U. S. 526; *Third Street Co. v. Lewis*, 173 U. S. 457; *Thompson v. Cent. Ohio R. R.*, 6 Wall. 134; *Warner v. Searle Co.*, 191 U. S. 195; *Weir v. Rountree*, 216 U. S. 602; *West. Un. Tel. Co. v. Ann Arbor R. R.*, 178 U. S. 239.

MR. JUSTICE DAY delivered the opinion of the court.

This case was brought in the Supreme Court of New York to recover damages for injuries sustained by the plaintiff while in the employ of the defendant Railroad Company. The complaint charged that the injuries were received while the plaintiff was employed in the defendant's colliery in Luzerne County, Pennsylvania. As to the manner of injury the complaint averred that while the plaintiff was in the employ of the defendant in its colliery, and was engaged in and about the performance of his duties, preparing and setting off a charge of dynamite for the purpose of blasting coal, the explosive gases which accumulated at the place where plaintiff was working suddenly ignited and exploded, causing a squib attached to the charge of dynamite to catch fire and to be immediately consumed, so that the charge of dynamite was exploded and discharged, and as a result thereof the plaintiff received great, severe and permanent injuries.

The complaint also charged the carelessness and negligence of the defendant in failing to provide and keep a safe place for the plaintiff to work, and certain other acts unnecessary to be repeated but alleged to be of a negligent character. The complaint also charged a violation of the law of the State of Pennsylvania, providing for the health and safety of persons employed in or about the coal mines of that State. Upon the petition of the Railroad Company the case was removed to the District Court of the United States for the Eastern District of New York, where trial was had and judgment rendered in favor of the plaintiff.

The petition for removal alleged that the plaintiff, at the beginning of the suit and since resided in Richmond County, New York, and was at the time of the beginning of the action and still was an alien and citizen of a foreign country, and that the defendant Railroad Company was a corporation organized and existing under the laws of the

State of Pennsylvania. After the removal of the case to the United States District Court, the defendant filed an answer, taking issue upon the allegations of the complaint. Five months after the removal, the plaintiff filed an amended complaint, which contained the same allegations as to the manner of the injury, and allegations as to the common law and statutory liability of the defendant. The amended complaint added certain allegations wherein it was alleged that the defendant, for the purpose of its railroad, owned, managed and operated a certain mine or colliery known as the "Pettibone" colliery in the State of Pennsylvania, in which plaintiff was employed at the time of the injury, and where at all of the times covered by the complaint the defendant did and still does mine and prepare anthracite coal for use in its locomotives and engines and other equipment used in its business as a common carrier in interstate commerce. That at the time of receiving the injury plaintiff was employed by the defendant at said mine or colliery in such interstate commerce. The amended complaint did not change the allegations as to the manner in which plaintiff received his injuries. The defendant took issue upon the amended complaint and the case came on for trial. In the course of the trial, during examination of a witness, while evidence was being offered to show the disposition of the coal mined, counsel for defendant stated that it used the coal mined in its locomotives in interstate commerce. He said that as a matter of fact and as a matter of law coal which plaintiff mined was used in that way, and that "we are engaged in interstate commerce." At the close of the evidence the defendant moved for the direction of a verdict upon the ground that the evidence had established liability under the Federal Employers' Liability Act, and that as the amended complaint had been served more than two years after the injuries occurred, the action was barred by the statute of limitations. Thereupon plaintiff's counsel moved to

amend the amended complaint by striking out the allegations relating to interstate commerce. The court denied this motion and submitted the case to the jury, upon the issues joined under the common law and Pennsylvania statute. The Circuit Court of Appeals held that the trial court should have granted this motion, but that the case was devoid of any showing that the Federal Employers' Act applied under the circumstances, and that, had it applied, it would have been the controlling law of the case, and the court affirmed the judgment of the District Court.

There is a motion to dismiss for want of jurisdiction of this court to review the judgment of the Circuit Court of Appeals. It is well settled that in order to review the judgment of the Circuit Court of Appeals jurisdiction in the District Court must not have rested upon diverse citizenship alone, but that jurisdiction must in part at least have arisen because of averments showing a cause of action under the Constitution or laws of the United States, and in order to come to this court by writ of error to the Circuit Court of Appeals such allegations of Federal right must be found in the complaint. *McFadden v. United States*, 210 U. S. 436. The allegations in that respect must show as a basis of action a substantial controversy respecting the Constitution or laws of the United States. *Hull v. Burr*, 234 U. S. 713. In the absence of such allegations in the complaint the jurisdiction of the Circuit Court of Appeals is final. *Roman Catholic Church &c. v. Pennsylvania Railroad Co.*, 237 U. S. 575, and *Merriam v. Syndicate Publishing Company*, 237 U. S. 619, both decided June 1, 1915.

The averments of the complaint as to the manner of the receiving of the injury by plaintiff showed conclusively that it did not occur in interstate commerce. The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was

mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce, facts essential to recovery under the Employers' Liability Act.

It therefore follows that the jurisdiction of the Court of Appeals in this case was final. The plaintiff in error insists that the Court of Appeals should have reversed the case and remanded it to the District Court with instructions to remand the case to the state court for want of jurisdiction in the Federal court, and this because in the course of the testimony the plaintiff said that he had been a citizen of the United States some years before the action was begun, and the defendant alleges that the record shows, notwithstanding the allegations in its petition for removal, that plaintiff did not remove to New York from Pennsylvania until after the suit was brought, the result being that, if there was no foundation for the suit under a Federal statute, the want of diverse citizenship ousted the jurisdiction of the District Court. Without expressing any opinion as to what the Circuit Court of Appeals should have done, we are not concerned with its action unless we have jurisdiction to review the judgment of that court, which we do not have for the reasons already stated.

Dismissed for want of jurisdiction.